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Supreme Court, U.S.
FILED
NOV 28 1997
CLERK

No. 97-300

In The

Supreme Court of the United States

October Term, 1997

TERRY L. STEWART, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, et al.,

Petitioners,

vs.

RAMON MARTINEZ-VILLAREAL,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX

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Petition For Certiorari Filed August 18, 1997
Certiorari Granted October 14, 1997

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1998

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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

RAMON MARTINEZ-VILLAREAL, Petitioner, -vs- SAMUEL A. LEWIS, et al., Respondents.	CIV 86-296-TUC-RMB MOTION FOR SUMMARY JUDGMENT (Filed July 30, 1993)

Pursuant to Rules 5 and 11 of the Rules Governing § 2254 Cases, and Rule 56(b) of the Federal Rules of Civil Procedure, Respondents oppose Petitioner's Amended Petition for Writ of Habeas Corpus and request that this Court dismiss the amended petition because it fails to state a claim upon which relief can be granted, there are no genuine issues of any material fact, and Respondents are entitled to judgment as a matter of law. This response is based on the following Memorandum of Points and Authorities.

DATED this 30th day of July, 1993.

Respectfully submitted,

GRANT WOODS
ATTORNEY GENERAL

/s/Bruce M. Ferg

BRUCE M. FERG
ASSISTANT ATTORNEY GENERAL

ATTORNEYS FOR RESPONDENTS

* * *

101. Competency To Be Executed.

It is asserted that Petitioner lacks the mental capacity necessary for him to be constitutionally executed under *Ford v. Wainwright*, 477 U.S. 399, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986). It appears that this claim is not ripe for adjudication. A prisoner cannot be executed in Arizona except pursuant to a warrant issued by the Arizona Supreme Court. Arizona Rule of Criminal Procedure 31.17 provides:

> **c. Fixing the Date of Execution After a Death Sentence is Affirmed.** When a conviction and sentence of death is affirmed, the Supreme Court shall fix the time for execution of the sentence and shall issue a warrant to the superintendent of the state prison directing him to execute the sentence. The superintendent shall make a return on the warrant to the Supreme Court showing the manner and time of execution.

There is no execution warrant outstanding with regard to Petitioner. There is, however, a stay of execution issued by this Court which is still in effect.

The Arizona Supreme Court appears to be applying Criminal Rule 31.17(c) in such a way that no warrant for execution will issue while a federal court stay is in effect. Thus, after James Clark's lengthy habeas corpus litigation was concluded by the denial of a petition for certiorari, the State filed a motion for issuance of an execution warrant. (Exhibit A hereto.) However, Clark's counsel objected that a District Court stay of execution was still in effect because the Ninth Circuit's formal mandate had not yet been issued. (Exhibit B.) The Arizona Supreme Court refused to issue the warrant because of the existence of the stay. (Exhibit C.) After the Ninth Circuit mandate issued, effectively dissolving the stay, the State renewed its motion for the issuance of a warrant, and only then was the warrant issued. (Exhibits D, E.)

Before a federal court can consider a legal claim, there must be a "case or controversy" under Article III of the Constitution. *Whitmore v. Arkansas*, 495 U.S. 149, 110 S. Ct. 1717, 1722, 109 L. Ed. 2d 135 (1990).

> To establish an Art. III case or controversy, a litigant first must clearly demonstrate that he has suffered an "injury in fact." That injury, we have emphasized repeatedly, must be concrete in both a qualitative and temporal sense. The complainant must allege an injury to himself that is "distinct and palpable," *Warth, supra*, 422 U.S., at 501, 95 S.Ct., at 2206, as opposed to merely "[a]bstract," *O'Shea v. Littleton*, 414 U.S. 488, 494, 94 S.Ct. 669, 675, 38 L.Ed.2d 674 (1974), and the alleged harm must be actual or imminent, not "conjectural" or "hypothetical." *Los Angeles v. Lyons*, 461 U.S. 95, 101-102, 103 S.Ct. 1660, 1664-1665, 75 L.Ed.2d 675 (1983).

110 S. Ct. at 1723. "Allegations of possible future injury do not satisfy the requirements of Art. III. A threatened injury must be 'certainly impending' to constitute injury in fact." *Id.* at 1724-25. However, "It is just not possible for a litigant to prove in advance that the judicial system will lead to any particular result in his case." *Id.* at 1725. The Art. III requirements will not be relaxed just because litigation involves the death penalty. *Id.* at 1726.

In sum, Petitioner is not now facing and will not face execution for the foreseeable future. No warrant of execution can be expected to issue during the pendency of this habeas litigation, which in all likelihood will be a matter of years. Although Petitioner has a right not to be executed while incompetent, he is not now looking at an actual execution date, and competency is obviously a matter that can fluctuate over time. Therefore, his claim really is speculative and conjectural – a mere "possible future injury." Since such a claim is outside the jurisdiction of the Court, it must be dismissed. *Cf. Fernandez-Collado v. I.N.S.*, 644 F.Supp 741 (D. Conn. 1986), *aff'd without op.*, 857 F.2d 1461 (2d Cir. 1987) (habeas corpus petition denied because, although INS had detainer on petitioner, he could not be deported until after service of prison term, and hence was not yet in INS custody; therefore, his requested relief was not yet available). This Court cannot grant relief from a situation that may never occur. Only if a warrant for his execution issues, and if he still claims to be incompetent at that time, will there be a jurisdictionally sufficient case or controversy, and that will be the time to litigate the issue.

* * *

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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

RAMON MARTINEZ-VILLAREAL, Petitioner, vs. SAMUEL A. LEWIS, et al. Respondents.	No. CIV 86-296-TUC-RMB OPPOSITION TO RESPONDENTS' MOTION FOR SUMMARY JUDGMENT (Filed November 2, 1993)

* * *

91. *Competency to stand trial.*

After arguing preclusion and abuse of the writ, topics which have been addressed elsewhere in this memorandum, respondents argue that petitioner is merely suffering from "prison psychosis" and is not and was not incompetent. (M.S.J. at 39). Respondents claim that, on the record, petitioner is not incompetent or insane, citing and quoting *Boag v. Raines*, 769 F.2d 1341 (9th Cir. 1985). (M.S.J. at 39).

Boag is distinguishable, however. In the first place, that case was the third appeal on the issue of incompetency, and the defendant's competency in *Boag* was substantively addressed, contrary to the position advocated by respondents herein. "In a habeas proceeding, a petitioner is entitled to an evidentiary hearing on the issue of competency to stand trail [sic] if he presents sufficient facts to create a real and substantial doubt as to his competency, *even if those facts were not presented to the trial court*. *Boag*, 769 F.2d at 1343, *citing*, *Steinsvik v. Vinzant*, 640 F.2d 949, 954 (9th Cir. 1981) (emphasis added). Secondly, and more significantly, there was no professional psychologist's opinion presented in *Boag* that he was, in fact, incompetent. In the instant case, Dr. Geffen has unequivocally found that petitioner was incompetent. Finally, the issue of whether the petitioner's mental illness was presented in mitigation to the sentencing judge or whether he was not guilty by reason of insanity was not an issue in *Boag*, or at least the opinion does not address those concerns.

Respondents' argument ignores the fact that they tried everything in the book to prevent petitioner from being examined by an independent mental health expert. After first stressing that petitioner's claim to incompetence was an unexhausted claim, respondents then argued in state court that only by means of the statutory scheme set forth in A.R.S. § 13-4021 et seq. could petitioner's mental condition be inquired into. Since that was a ministerial duty, respondents argued, petitioner had no judicial remedy, and was dependent exclusively upon the warden's assessment of petitioner's competence. Needless to say the warden concluded that petitioner was

sane, despite a history of mental illness in prison, and years of being prescribed psychotropic medication by prison doctors notorious for not prescribing medicine for prisoners. The matter, according to respondents, was closed. Incredibly, the state superior court adopted the state's reasoning, despite the mandate of *Ford v. Wainwright*, 477 U.S. 399 (1986).

Upon return to federal court, respondents again zealously opposed the appointment of an independent mental health expert, this time on the grounds that the Arizona statute will change in 1994, and this court should wait and see what happens after the law changes. Respondents now argue a totally new theory in their motion for summary judgment, that the issue which forced this case back to state court, incompetence to be executed, is *not ripe*. (M.S.J. at 43). As that argument was never "exhausted" in state court, if anything should be precluded, it is that argument.

In conclusion, for respondents to have adamantly prohibited any meaningful review and evaluation of petitioner's mental health and now argue that the record is incomplete, and, therefore, that they win on summary judgment, is unfair, incorrect, and would amount to a gross denial of due process should it be granted. Only after a full and fair opportunity to examine and cross-examine those persons claiming to have expertise to make such a diagnosis can a just decision be made. Respondents' counsel is no more qualified to give such an opinion than petitioner's counsel. The difference is that petitioner's counsel never attempted to diagnose petitioner; he merely pointed out sufficient disturbing observations to merit further inquiry by mental health

professionals who could give expert opinions on the subject.

Respondents state that, "Claims asserting incompetence at trial are subject to preclusion on the basis of being abusive or procedurally defaulted, even when the petitioner faces a death sentence," *citing, Clanton v. Muncy,* 845 F.2d 1238 (4th Cir. 1988) and *Bainter v. Trickey,* 932 F.2d 713 (8th Cir. 1991). The facts of *Clanton* are distinguishable. The issue therein was whether a request for an "11th hour" stay of execution should be granted. The Court held that the claim was abusive since it was the same claim, under a different label, which had been substantively addressed on the merits in a prior habeas petition. The claim had to do with childhood abuse which was not brought out at sentencing. Having raised the claim before, and receiving a ruling on the merits, Clanton again tried to raise the same claim, this time under the label of incompetence during sentencing, claimaint [sic] that he failed to tell his attorney of the childhood abuse because he was incompetent. The *Clanton* case, therefore, is factually and procedurally distinguishable from the instant case.

Trickey was not a death penalty case, contrary to the apparent insinuation by respondents. Although it is true that *Trickey* held that the defendant's claim of incompetence was procedurally barred, respondents herein fail to point out that extensive evidence was taken in *Trickey* on the issue of whether his counsel was ineffective for failing to raise the competence issue. In that respect, *Trickey* favors petitioner's position herein.

* * *

101. *Competency to be executed.*

Comment has already been made herein as to the incredible position that respondents are now taking regarding this issue: that it is not ripe. Not only is this claim new and bizarre, but it would be unworkable. Nothing in the *Ford v. Wainwright, supra,* decision supports this leap in logic. In fact, the opposite is the only workable solution: if petitioner is incompetent now, he cannot be executed until he regains competency. To hold otherwise would place an incredible burden on the system. It is also interesting to note that the Arizona scheme set forth in A.R.S. § 13-4021 et seq., so championed by respondents up till now, has no such limitations as those now suggested by respondents.

Analogy can be made to the situation of a defendant found incompetent to stand trial. The competency determination is made at the outset, not the day of trial. If and when competency is restored, the trial proceeds. Similarly, if petitioner is presently incompetent to be executed, a finding needs to be made.

* * *

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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

RAMON MARTINEZ-VILLAREAL,	)	CIV 86-296-TUC-RMB
Petitioner,	)	REPLY TO RESPONSE
-vs-	)	TO MOTION FOR
SAMUEL A. LEWIS, et al.,	)	SUMMARY JUDGMENT
Respondents.	)	(Filed December 17, 1993)

Petitioner's Response, as demonstrated in the attached Memorandum, fails to prove any error in the Motion for Summary Judgment. Respondents therefore reiterate their request that this Court dismiss the petition because it fails to state a claim upon which relief can be granted, there are no genuine issues of material fact, and Respondents are entitled to judgment as a matter of law.

DATED this 17th day of December, 1993.

Respectfully submitted,

GRANT WOODS
Attorney General

/s/ Bruce M. Ferg
BRUCE M. FERG
Assistant Attorney General

Attorneys for RESPONDENTS

* * *

91. Alleged Incompetence To Stand Trial.

In the Petition it was asserted (based on little more than conclusory remarks about mental problems Petitioner allegedly has *now*) that he was incompetent to stand trial or be sentenced. (Petition at 40-41.) Respondents answered in several ways. First, it was argued that this claim should not even be considered on its merits, because it is both abusive (not having been presented in the first habeas petition) and procedurally precluded (having been defaulted by the failure to present it to the state courts at any time before the third Rule 32 petition). (Summary Judgment Motion at 36.) Attempting to defuse these preclusion arguments, Petitioner has tried to distinguish the decisions offered by Respondents as support for their position that claims of incompetency to be tried can be precluded, even in capital cases. He would like to limit *Clanton v. Muncy*, 845 F.2d 1238 (4th Cir.), *cert. denied*, 485 U.S. 1000 (1988), a capital case in which the federal court refused to reach the merits of a claim of incompetency at sentencing, to clearly abusive situations

where essentially the same claim had been litigated on the merits in a previous federal habeas petition. (Response at 61-62.) Such abusiveness, however, was only one prong of the court's multi-based ruling (845 F.2d at 1240-41); it further concluded that the incompetency claim "is also barred by reason of the procedural default found by the state habeas court." 845 F.2d at 1241. That is precisely what happened here: incompetency at trial was raised by Paragraph 87 of the third Rule 32 Petition. (P.C.R. 3 at 35.) The state argued that all the claims in that petition, with the exceptions of Davis' alleged ineffectiveness, good prison behavior as a new mitigating factor, and incompetency to be executed, were procedurally precluded. (*Id.* at 71-93.) The trial court explicitly agreed with the state's arguments in summarily dismissing that petition. (*Id.* at 138-40.) Therefore, this case *is* governed by *Clanton v. Muncy,* and the claim of incompetency during trial *is* precluded from consideration by this Court.

As additional support for its position that the claim of incompetency at trial is procedurally barred, Respondents cited *Bainter v. Trickey,* 932 F.2d 713 (8th Cir. 1991). Petitioner, as usual, attempts to cast Respondents in a bad light, by noting that *Trickey* "was not a death penalty case, contrary to the apparent insinuation by respondents." (Response at 62.) However, the Summary Judgment Motion at 36 clearly distinguished between *Clanton,* to which was affixed the explanatory parenthetical "(capital case)", and *Trickey,* which was given none such. Moreover, Petitioner is forced to concede the point for which *Trickey* was cited; "it is true that *Trickey* held that the defendant's claim of incompetence was procedurally barred." (Response at 62.) Petitioner nonetheless seeks to

distinguish *Trickey* away on the basis that an evidentiary hearing was held in that case on an ineffective assistance of counsel claim. (*Id.*) This argument avoids the point, which is that a claim of actual incompetence to be tried (i.e., the question under discussion at this point in the pleadings) was indeed ruled to be procedurally barred. 972 F.2d at 716. Moreover, the evidentiary hearing on ineffectiveness in *Trickey* was held by the *state* court (not the federal court), and no issue of procedural default *as to that claim* existed. Therefore, *Trickey* does support the preclusion of the claim of actual incompetence to be tried, but it does *not* support Petitioner's position that he is entitled to an evidentiary hearing before this Court.

Since the claim is so clearly precluded, Respondents continue to maintain that this Court need not (indeed, should not) examine it any further.

> We need not reach the merits to assure Campbell, and ourselves, that his claims have been fully considered. Indeed, upon determining that claims raised in a habeas petition are successive or abusive, we may not do so; respect for the finality of convictions, and the significant costs of federal habeas review, forbid it.
>
> > [A] court may not reach the merits of: (a) *Successive claims* which raise grounds identical to grounds heard and decided on the merits in a previous petition; (b) new claims, not previously raised which constitute an *abuse of the writ;* or (c) *procedurally defaulted claims* in which the petitioner failed to follow applicable state procedural rules in raising the claims.

> *Sawyer v. Whitley*, ___ U.S. ___, ___, 112 S.Ct. 2514, 2518, 120 L.Ed.2d 269 (1992) (citations omitted).

Campbell v. Blodgett, 982 F.2d 1321, 1324-25 (9th Cir. 1992) (emphasis in original). However, lest the Court be concerned about the fairness of its proceedings, the merits will be briefly noted.

The Summary Judgment Motion at 36-40 pointed out that there is a very high standard of proof which a habeas petitioner who claims actual incompetence at trial must satisfy in order for that claim to be considered by the federal courts. As an example, Respondents pointed to *Boag v. Raines*, 769 F.2d 1341 (9th Cir. 1985), *cert. denied*, 474 U.S. 1085 (1986); there the Court of Appeals found *insufficient* "(1) five attempted suicides between 1954 and 1965; (2) repeated head injuries; (3) a story of bizarre behavior; and (4) alcoholism. Boag also relies on the report of a prison psychiatrist, made four months before trial, which stated that he had a 'sociopathic personality disturbance, anti-social reaction,' and the statement of a California judge, made six months before trial, that Boag needed 'intensive psychiatric treatment'." 769 F.2d at 1343. Petitioner attempts to distinguish *Boag* away on the premise that there "the defendant's competency . . . was substantively addressed." (Response at 59.) If Petitioner intends to convey that Boag received a federal evidentiary hearing on his claim he is clearly wrong. The Ninth Circuit noted that a habeas petitioner "is entitled to an evidentiary hearing on the issue of competency to stand trial if he presents sufficient facts to create a real and substantial doubt about his competency . . . " 769 F.2d at 1343. It then reviewed the evidence noted above which

Boag offered (which had not been presented to the state courts), after which it stated, "We conclude that the district court properly found that the new evidence presented by Boag did not raise a real and substantial doubt as to his competency." 769 F.2d at 1344. Thus, there is a high threshold level of proof to be crossed before an evidentiary hearing will be granted, and Boag failed to satisfy that initial burden. Hence, *Boag* is not distinguishable, and clearly militates against granting Petitioner an evidentiary hearing or any other relief.

Petitioner continues to bewail the fact that Respondents have insisted that he follow appropriate procedures to present his claims, even resorting to statements unsupported by the record, such as the supposed notoriety of prison doctors for not prescribing medicine for prisoners, and the asserted "fact" that Respondents "tried everything in the book to prevent petitioner from being examined by an independent mental health expert." (Response at 60-61.) Respondents have never opposed examination of Petitioner by an independent expert – something he has been free to obtain at any time; opposition has only been to attempts to present claims in the wrong forum and to spending taxpayer money for examinations unless they were clearly authorized and likely to be relevant. For such good faith litigation positions no apology is necessary and none is tendered; Petitioner has no special dispensation to ignore the rules just because this is a capital case. *Murray v. Giarratano*, 109 S. Ct. at 2770-71.

* * *

101. Competency To Be Executed.

Respondents have suggested that this issue is not ripe for decision, because no execution can take place without the issuance of a warrant of execution, no such warrant concerning Petitioner presently exists, and the Arizona Supreme Court apparently is not issuing such warrants concerning defendants who are protected (as is Petitioner) by a federal stay of execution. Moreover, mental competency, of course, can change over the course of time. Thus, the claim presents nothing more than a possible future injury, which is insufficient to satisfy the Art. III "case or controversy" requirement, and there currently is no issue over which this Court properly has jurisdiction. (Summary Judgment Motion at 43-45.) Petitioner answers that nothing in *Ford v. Wainwright*, 477 U.S. 399, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986), supports this position. (Response at 65.) On the other hand, neither does anything in *Ford* militate against it. The defendant in *Ford* was subject to a live, unstayed warrant of execution at the time he invoked the jurisdiction of the federal courts (477 U.S. at 404), and the issues raised by the case were the existence of authority to execute the insane and the kind of state factfinding procedures necessary to resolve competency questions. Thus, there was no basis for a ripeness question and *Ford* did not address it because it simply never came up.

Petitioner makes no attempt to answer the authority and reasoning presented by the Motion For Summary Judgment, and seeks to dismiss its argumentation with a conclusory remark that it is "unworkable." (Response at 65.) It is Petitioner's approach, however, which is unworkable; rather than have a single adjudication of

competency, at a time when all his other claims have been resolved and a warrant has been issued, so that an execution actually is imminent within a reasonable period of time, he advocates "plac[ing] an incredible burden on the system" by having one adjudication now, plus at least one more, after all the years it typically takes to resolve the other claims have transpired. Even in Petitioner's competency to stand trial analogy, speedy trial guarantees will insure that a competency determination is made within a reasonably short time before the relevant proceeding (the trial) occurs; no such guarantees exist in this case. To do a competency determination now would be futile, because it will certainly have to be repeated when the time for execution finally arrives.

The Court should therefore conclude that this claim is not now ripe for determination. Should the Court nonetheless deem it proper to rule on the issue it should hold the claim meritless. The only support offered is the Geffen report, which has already been shown to be so riddled with flaws as to be incapable of supporting a finding of incompetence, especially in light of the opposite conclusion reached by the 1991 evaluation (Exhibit H) and the information about Petitioner's manipulative invocation of purely subjective mental complaints disclosed by the prison records. Therefore, if the merits of the question are considered, the only proper resolution would be denial.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

RAMON MARTINEZ-VILLAREAL Petitioner, vs. SAMUEL A. LEWIS et al., Respondents.	NO. CIV 86-296 TUC RMB **ORDER** (Filed Feb. 28, 1997)

Pursuant to instructions of the Court of Appeals for the Ninth Circuit set forth in *Martinez v. Lewis*, 80 F.2d 1301 (9th Cir.), *cert. denied*, ___ U.S. ___, 117 S.Ct. 588, 136 L.Ed.2d 517 (1996),

IT IS ORDERED that Petitioner Ramon Martinez-Villareal's Claim 4.16 regarding competency to be executed is **DENIED WITHOUT PREJUDICE**;

IT IS FURTHER ORDERED that all remaining claims of the Petition are **DENIED WITH PREJUDICE**.

DATED: February 27, 1997 /s/ Richard M. Bilby
Richard M. Bilby
United States
District Court

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

RAMON MARTINEZ-VILLAREAL, Plaintiffs vs. SAMUEL A. LEWIS, ET AL., Defendants,	**JUDGMENT IN A CIVIL CASE** Case NO. CV-86-296-TUC-RMB (Filed February 28, 1997)

DECISION BY COURT. This action came under consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Petitioner Ramon Martinez-Villareal's Claim 4.16 regarding competency to be executed is **DENIED WITHOUT PREJUDICE.**

IT IS FURTHER ORDERED that all remaining claims of the Petition are **DENIED WITH PREJUDICE.**

February 28, 1997
Date

RICHARD H. WEARE
CLERK

/s/ Maureen Gorski
(By) Deputy Clerk,
Maureen Gorski

cc: OB, RMB, BRUNER, FERG, DPLC, DESSAINT, ACRP

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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

RAMON MARTINEZ-VILLAREAL, Petitioner, TERRY STEWART, et al., Respondents.	NO. CIV 86-296-TUC-RMB MOTION TO RECONSIDER ORDER AND JUDGMENT (Filed March 12, 1997)

Pursuant to this Court's order and judgment entered February 28, 1997, petitioner's claim 4.16 regarding competency to be executed was denied without prejudice. Petitioner hereby moves this court to reconsider that aspect of its order, pursuant to Rule 59, *Fed.R.Civ.P.*

Petitioner directs the Court's attention to certain sections of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), amending 28 U.S.C. § 2254.

In that regard, § 2244(b)(1) states: "A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed." Further on in that section, subparagraph (b)(3)(A) states: "Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate

court of appeals for an order authorizing the district court to consider the application."

The Court of Appeals, however, is limited in the type of successor petitions that may be granted. The applicable portion of § 2255 states: "A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain – (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convicning [sic] evidence that no reasonable factfinder would have found the movant guilty of the offense; or (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court that was previously unavailable."

In other words, petitioner's claim to incompetence to be executed would be barred notwithstanding this Court's dismissal "without prejudice." This would contravene the clear intention of the parties, violate due process under the Fifth and Fourteenth Amendments, and constiute [sic] an unconstitutional suspension of the writ of habeas corpus in violation of Art. I, Sec. 9 of the Constitution.

Petitioner did file his claim in his last petition, prior to the passage of the AEDPA. It was the State that suggested that the claim was not ripe since the Arizona Supreme Court had not yet issued a warrant of execution, and this Court agreed. (Order and Memorandum Decision at 18-19). The Ninth Circuit concurred that the claim was premature. *Martinez-Villareal v. Lewis*, 80 F.3d 1301, 1307 (9th Cir. 1996).

In light of the understanding of all parties that petitioner's claim to incompetence to be executed would await a future hearing, it would be a cruel injustice to now find that petitioner's challenge was barred as a successive claim. In *Lindh v. Murphy*, 96 F.3d 856 (7th Cir. 1996) the Seventh Circuit found that the AEDPA applied to cases which were pending at the time it took effect. The Ninth Circuit reached the opposite conclusion in *Jeffries v. Wood*, 103 F.3d 827 (9th Cir. 1996). The Supreme Court granted certiorari in *Lindh v. Murphy* on January 10, 1997 to resolve this issue. In the interest of fairness and in an abundance of caution, petitioner asks that this Court reconsider its order dismissing his claim to incompetence to be executed and amend its order of February 28, 1997 holding this issue in abeyance pending the outcome of the current proceedings in the Superior Court in Pinal County to determine compentence [sic] to be executed under A.R.S. § 13-4022.

Respectfully submitted March 11, 1997.

/s/ Sean Bruner
Sean Bruner
Attorney for Petitioner

Copy mailed/delivered this date to:

Bruce M. Ferg
Assistant Attorney General
402 West Congress
3rd Floor
Tucson, Arizona 85701

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

RAMON MARTINEZ-VILLAREAL Petitioner, vs. SAMUEL A. LEWIS et al., Respondents.	NO. CIV 86-296 TUC RMB **ORDER** (Filed March 24, 1997)

Petitioner files under Fed. R. Civ. P. 59, a "Motion to Reconsider Order and Judgment" wherein he seeks this Court to hold in abeyance his claim that he is incompetent to be executed. Petitioner cites no authority for such action except to warn the Court that the premature claim could be precluded as a successive claim by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Petitioner requests that in the interest of fairness and in an abundance of caution, that this Court amend its order to hold this single claim in abeyance pending the outcome of the proceedings in Superior Court in Pinal County to determine whether Petitioner is competent to be executed under A.R.S. § 13-4022.

After considering Petitioner's arguments, the Court finds no reason to grant the requested relief. That particular claim could not even be construed as an unexhausted claim since it was not ripe when it was presented. For this

reason, the Court dismissed it without prejudice. Therefore, the Court has no intention of treating the "incompetency to be executed" claim as a successive petition. Accordingly,

IT IS ORDERED that Petitioner's "Motion to Reconsider Order and Judgment" in **DENIED.**

DATED this 24 day of March, 1997,

/s/ Richard M. Bilby
Richard M. Bilby
Senior United States
District Judge

SUPREME COURT OF ARIZONA

STATE OF ARIZONA, Appellee, vs. RAMON MARTINEZ-VILLAREAL, Appellant.	Supreme Court No. CR-83-0207-AP [5963] Court of Appeals No. 2 CA-CR 3160 Santa Cruz County Nos. 4541-A, 4653-A and 4628-A **WARRANT OF EXECUTION** (Filed April 15, 1997)

The appeal in the above-entitled cause was heard and fully considered by this Court on the 12th day of April, 1984 and having finally decided the cause, this Court on the 10th day of July, 1985, did affirm the judgment of the Superior Court of Santa Cruz County, State of Arizona, and did file its opinion, which opinion is now of record in this Court, is still in effect, and, as shown by this Court's record, has not been stayed or affected by any subsequent decision of this or any other Court.

WHEREAS, a Warrant of Execution issued by this Court on March 12, 1997 was quashed by order in Martinez-Villareal v. Johnson, No. CV-97-0151-SA, dated April 8, 1997, which order further directed that the execution be set for May 21, 1997,

NOW THEREFORE, IT IS ORDERED, that Wednesday, the 21st day of May, 1997, be and the same is hereby fixed as the time when the judgment and sentence of death pronounced upon the appellant, RAMON MARTINEZ-VILLAREAL, by the Superior Court of Santa Cruz

County, State of Arizona, shall be executed by administering to RAMON MARTINEZ-VILLAREAL an intravenous injection of a substance or substances in a lethal quantity sufficient to cause death, except that RAMON MARTINEZ-VILLAREAL shall have the choice of either lethal injection or lethal gas.

IT IS FURTHER ORDERED that the Clerk of this Court forthwith prepare and certify under his hand and the seal of this Court a full, true and correct copy of this Warrant, and cause the same to be delivered to the Director of the Department of Corrections and the Superintendent of the State Prison, at Florence, Arizona, and the same shall be sufficient authority to them for the execution of the appellant, RAMON MARTINEZ-VILLAREAL, as commanded by the judgment and sentence of death pronounced against RAMON MARTINEZ-VILLAREAL, by the Superior Court of Santa Cruz County, State of Arizona, on the 20th day of May, 1983.

Upon the execution of RAMON MARTINEZ-VILLAREAL, the Superintendent shall, pursuant to Rule 31.17(c), Rules of Criminal Procedure, forthwith make a return upon this Warrant to the Supreme Court of Arizona, which return shall show the time, mode and manner of execution.

Dated in the City of Phoenix, Arizona, at the Arizona Courts Building, this 15th day of April, 1997.

/s/ Thomas A. Zlaket
THOMAS A. ZLAKET, Chief Justice

/s/ Charles E. Jones
CHARLES E. JONES, Vice Chief Justice

/s/ Stanley G. Feldman
STANLEY G. FELDMAN, Justice

/s/ James Moeller
JAMES MOELLER, Justice

/s/ Frederick J. Martone
FREDERICK J. MARTONE, Justice

STATE OF ARIZONA
SUPREME COURT

I, NOEL K. DESSAINT, Clerk of the Supreme Court of the State of Arizona, hereby certify the above and foregoing (2 pages) to be a full and true copy of the WARRANT OF EXECUTION of RAMON MARTINEZ-VILLAREAL, filed by said Supreme Court in the said above-entitled action on this 15th day of April, 1997.

IN WITNESS WHEREOF, I hereunto set my hand and affix the official seal of the Supreme Court of the State of Arizona, this 15th day of April, 1997.

/s/ Noel K. Dessaint,
NOEL K. DESSAINT, CLERK

Fredric F. Kay
Federal Public Defender
Denise I. Young (Arizona Bar No. 007146)
Dale A. Baich (Ohio Bar No. 0025070)
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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

RAMON MARTINEZ-VILLAREAL, Petitioner, vs. TERRY STEWART et al., Respondents.	**CAPITAL CASE** **EXECUTION SCHEDULED FOR 5-21-97** No. CIV-86-296 TUC RMB MOTION FOR EXPERT SERVICES AND/OR ACCESS TO CLIENT AND APPOINTMENT OF COUNSEL (Filed May 13, 1997)

Petitioner Ramon Martinez-Villareal, through counsel specially appearing herein, and pursuant to 21 U.S.C. § 848(q)(4) and (9), moves this Court for appointment of necessary experts, assistance and/or access to his client

to allow this Court to properly determine his competency to be executed. The following facts support this motion:

1. Petitioner Ramon Martinez-Villareal is mentally retarded and he is unaware of his pending execution and the reasons for it. Mr Martinez-Villareal, through counsel, alleged Mr. Martinez-Villareal "did not and does not have the mental capacity to appreciate the nature of his sentence." Amended Petition for Writ of Habeas Corpus ("Habeas Petition"), filed Mar. 26, 1993 at ¶ 4.16[1] Since Mr. Martinez-Villareal did not and does not have the mental capacity to appreciate the nature of his sentence, under *Ford v. Wainwright*, 477 U.S. 399 (1986), his rights under the Eighth and Fourteenth Amendment would be violated if he is executed. *Id.* at ¶ 106.

2. The Court issued a writ of habeas corpus. Entry, Oct. 21, 1994 [Doc. No. 137]. The Court found that Mr. Martinez-Villareal did not receive the effective assistance of counsel and vacated the sentence of death. *Id.*, Order and Memorandum Opinion, Oct. 21, 1994 [Doc. No. 136], at 30.[2] As to the challenge to Mr. Martinez-Villareal's

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[1] Facts supporting the claim were outlined in ¶¶ 25 through 90 of the habeas petition.

[2] The Court's finding was based, in part, on the testimony of Dr. Garcia-Bunuel. Order and Memorandum Opinion, Oct. 21, 1994 at 29. Dr. Garcia-Bunuel opined that Mr. Martinez-Villareal suffers from paranoid schizophrenia and he had this mental disease since he was an adolescent. *Id.* at 26. The Court also observed:

> Physically, Martinez-Villareal is a small man, no more than five feet tall. During the proceedings his face was devoid of expression; his hair was greasy and stood upward in peaks. His eyes were downcast and

competency to be executed, the Court ruled "[a]t present, there is no execution warrant outstanding as to Martinez-Villareal since this Court issued its stay. Thus, Martinez-Villareal is not facing execution nor with appellate review will he face likely execution in the near future. This claim is premature and denied without prejudice." Order and Memorandum Opinion, Oct. 21, 1994 at 19.

3. On appeal, the Ninth Circuit found that the writ was improperly granted. *Martinez-Villareal v. Lewis*, 80 F.3d 1301, 1305 (9th Cir. 1996). The court based its decision on a procedural bar to Mr. Martinez-Villareal's claim of ineffective assistance of counsel. *Id.* However, the court of appeals explicitly stated, "[t]o eliminate any ambiguity, we reiterate that the claim of Martinez-Villareal's current incompetence was denied as premature by the district court. That decision was not challenged on appeal. Our instruction to enter judgment denying the petition is not intended to affect any later litigation of that question." *Id.* at 1309, n.1. On remand, this Court entered an order denying, without prejudice, Mr. Martinez-Villareal's competency challenge. Order and Entry, Feb. 28, 1997.[3] [Doc. Nos. 152 and 153.]

> once he was led into the courtroom, his only movement was to remove the interpreter's headphones. Other than the effort it took to perform this task, [Martinez-Villareal] was essentially catatonic for the duration of the two day hearing.

Id. at 14-15.

[3] The Court, through a subsequent order, stated that the reason the competency to be executed claim was dismissed was because "it was not ripe when it was presented. For this reason, the Court dismissed it without prejudice. Therefore, the Court has no intention of treating the 'incompetency to be executed' claim as a successive petition." Order, Mar. 24, 1997 [Doc. No. 155], at 1. Petitioner appealed that order simply to ensure that jurisdiction was not lost if Respondents should take a contrary position when the petition is supplemented with this claim.

4. On April 15, 1997, the Arizona Supreme Court issued an execution warrant setting Mr. Martinez-Villareal's execution for 12:05 am on Wednesday, May 21, 1997. *State v. Martinez-Villareal*, No. CR-83-0207 AP (Ariz. Apr. 15, 1997). [Exhibit A.] A hearing was held in the Pinal County Superior Court on April 6, May 6, 7 and 8, 1997,[4] to determine whether Mr. Martinez-Villareal was competent to be executed. At the state court hearing, substantial evidence and testimony established that Mr. Martinez-Villareal continues to experience symptoms of a major psychotic disorder, which was traced back to his childhood, and that his condition is compounded by mental retardation and brain damage. The state claimed that Mr. Martinez-Villareal is malingering all of these conditions.

5. Prior to and during the hearing, counsel for Mr. Martinez-Villareal asked the superior court for leave to conduct a MRI scan and neurometric EEG of Mr. Martinez-Villareal and further asked for an expert specializing in the field of mental retardation to exam Mr. Martinez-Villareal. Counsel explained that the accusation that Mr. Martinez-Villareal was malingering his condition, and that he made statements reflecting an awareness of his crime and punishment, increased the need for a reliable determination of the issues of brain damage and

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[4] The hearings on April 6th and May 8th were half day hearings.

mental retardation. Counsel also requested an opportunity to conduct further specific testing into the issue of mental retardation – including objective assessment of Mr. Martinez-Villareal's adaptive behavior skills which would provide substantial proof of his reasoning capacity, or lack thereof.[5] The record reveals that mental retardation is a significant contributing factor to Mr. Martinez-Villareal's mental capacity and his behavior in the Arizona Department of Corrections. Finally, counsel requested additional time and resources to conduct a thorough background investigation into Mr. Martinez-Villareal's family and social history. It is important to the issue of malingering – which the state injected into the case – to verify as much of Mr. Martinez-Villareal's medical and social history as possible, including past head trauma and a possible psychiatric referral by defendant's uncle.[6] All of the requests were denied by the superior court and the hearing commenced without petitioner having an opportunity to present such evidence.

6. A day after the conclusion of the evidence the superior court determined, *inter alia*, that:

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[5] Counsel requested the court to appoint Dr. Denis Keyes, an expert in the field of mental retardation who was willing to conduct an expedited examination which would not have delayed the hearing process.

[6] Mr. Martinez-Villareal, because of his mental impairment and illiteracy in Spanish and English, has never been able to provide reliable background, health and social history. He does not even know his age or date of birth. Counsel requested and were denied time and resources to locate the family members who could verify the fact that Mr. Martinez-Villareal has been mentally ill since childhood.

> Credible testimony and medical evidence was presented at the hearing herein that the Defendant may suffer from a mental illness, mental retardation and/or organic brain damage; credible testimony and medical evidence was likewise presented at the hearing herein that some or all of the symptoms or outward manifestations of those illnesses or conditions may be and may have been exaggerated or contrived by the Defendant; credible testimony and evidence was likewise presented at the hearing herein that the Defendant, even if suffering from any or all of those illnesses or conditions, would not necessarily thereby be precluded from being competent to be executed, as defined by the law. . . .

State v. Martinez-Villareal, No CR 97022291 (may 9, 1997) [Exhibit B.] The Court concluded Mr. Martinez-Villareal was aware that he is to be punished for the crime of murder and that the punishment for that crime is death, and that he is therefore competent to be executed. *Id.*

7. Mr. Martinez-Villareal is now before this Court requesting expert services and the appointment of counsel so that his competency to be executed claim can be fully developed and presented in this Court. Given the ambiguity and inadequacy of the trial court's findings, assuming they can even be characterized as such, this Court will need to conduct a de novo review of this claim. As a result, to make a full and fair decision on this claim, it will need all the information it can obtain on this serious issue.

8. This Court has jurisdiction to hear this motion. Congress, through 28 U.S.C. § 848(q)(4)(B) "established a

right to preapplication legal assistance for defendants in federal habeas corpus proceedings." *McFarland v. Scott*, 512 U.S. 849, ___, 114 S.Ct. 2568, 2572 (1994). This assistance extends to the services of investigators and other experts [who] may be critical in the preapplication phase of a habeas corpus proceeding, when possible claims and their factual bases are researched and identified." *Id.* 114 S.Ct. at 2572 *citing* 21 U.S.C. § 848(q)(9). This Court has the authority to grant a fee request to assist Mr. Martinez-Villareal "in preparing for his federal habeas efforts." *Calderon v. United States District Court for the Eastern District of California*, ___ F.3d. ___, 1997 WL 183877, at *1, *6 (9th Cir. Apr. 16, 1997). A " 'post conviction proceeding' within the meaning of section 848(q)(4)(B) begins upon the filing of the defendant's motion requesting the assistance of counsel for his federal habeas corpus proceeding." *Id. citing McFarland v. Scott*, 114 S.Ct. at 2572-73.[7]

9. Petitioner requires expert assistance and/or access to his client before he files his supplemented petition for writ of habeas corpus.[8] As discussed above, this

[7] Mr. Martinez-Villareal's request for appointment of counsel is made at ¶ 13, *infra*.

[8] If this Court appoints the Federal Public Defendant as requested below, it need only grant the request for access to Petitioner to conduct necessary testing. Under the policies of the Arizona Department of Corrections ("DOC"), a contact visit between counsel, a mental health expert and Petitioner will not be allowed absent a court order. The state court issued such an order below, and contact visits were allowed. Petitioner requests that this Court also issue such an order so that the needed evaluations can go forward. In addition, this Court previously allowed experts to have access to Mr. Martinez-Villareal for purposes of testing. *See* Doc. Nos. 90, 108, 110, and 112.

is because, despite requests both before and during the recent state court hearing on whether Petitioner was competent to be executed, the state court denied Petitioner the services of necessary experts, including an expert in field of mental retardation. In the habeas proceedings in this Court on Claim 4.16, Mr. Martinez-Villareal will present facts concerning his mental retardation and explain that mental retardation exacerbates and relates to his present incompetency.

10. Mr. Martinez-Villareal is requesting from this Court that which was denied to him by the state court, and what was needed to determine the question of his competency. He is requesting funding for an MRI scan, which creates a visual image of the brain structure, and neurometric EEG, which measures brain functioning, as well as funding to retain Dr. Dennis Keyes.[9]

10.1 Jonathan H. Pincus, M.D., conducted a neurological examination of Mr. Martinez-Villareal and reported not only is Mr. Martinez-Villareal psychotic, but "[t]his subject is mentally retarded, his IQ 61, and his frontal lobe functions are impaired on neurological examination." Correspondence from Jonathan H. Pincus to Sean D. O'Brien, Apr. 1, 1997 ("Pincus correspondence") at 6. [Exhibit C.] Dr. Pincus concluded "[a]n MRI of [Mr. Martinez-Villareal's] brain could help to explain why his brain is not working properly." *Id.*

10.2 Joseph Geffen, PhD., also tested Mr. Martinez-Villareal and concluded he is "mentally retarded, brain damaged and psychotic." Affidavit of Dr. Geffen,

[9] *See* footnote 8, *supra*.

Apr. 8, 1997 ("Geffen Affidavit") at ¶ 2. [Exhibit D.] According to Dr. Geffen, "[a]n MRI is necessary to help detect any structural abnormality of the brain that may account for the organic brain dysfunction indicated by neurological and neuropsychological testing and patient history." *Id.* at ¶ 4. The neurometric EEG is "especially critical in examining Mr. Martinez-Villareal's frontal cerebral cortex, which is the seat of higher brain functions, including the ability to understand the abstract concepts necessary to understand the cause-effect relationship between the crime and the punishment." *Id.* at ¶ 6. Dr. Geffen concluded, that in addition to the MRI and neurometric EEG, "it would be important to obtain an examination of an expert in the area of mental retardation, preferably one who is bi-lingual. . . . [I]t appears that behavior consistent with mental retardation is being misinterpreted [by state officials] as indicia of competence. . . . Although Mr. Martinez-Villareal is brain damaged and psychotic, his impairment is significantly exacerbated by his extremely limited intellectual functioning." *Id.* at ¶ 7.

10.3 Assessment of Mr. Martinez-Villareal by a psychologist specializing in the field of mental retardation is critical to an accurate assessment to his present level of competence. Counsel has consulted Dr. Denis Keyes, PhD., Assistant Professor of Special Education at the College of Charleston, South Carolina, regarding the issue of mental retardation in this case. Dr. Keyes' initial impression of this case is that Mr. Martinez-Villareal's mental retardation is under emphasized. Although IQ testing places him well within the range of mental retardation, an adaptive skills diagnosis is necessary to detect

the severity of his mental retardation. A subject's adaptive skills are more important to a diagnosis of mental retardation than IQ testing alone. Dr. Keyes would administer the Vineland Scale of adaptive behavior, which involves interviewing a minimum of four to five individuals who are most familiar with Mr. Martinez-Villareal's development and behavior, including his family, friends, lawyers and corrections staff. From reviewing portions of the record in this case, Dr. Keyes has expressed a concern that Mr. Martinez-Villareal, as is typical of most persons with mental retardation, is extremely suggestible and subject to manipulation during questioning. He has a specific concern regarding this case, which could be addressed by further investigation, that statements and conduct of Mr. Martinez-Villareal has been misinterpreted as indicia of competence.

11. The refusal by the state court to provide funding for testing and experts, effectively denied Mr. Martinez-Villareal of the adequate fact-finding procedure that he was entitled to in the state court. Two key elements were missing from the hearing in state court: test results, which in turn would offer proof of brain damage; and an evaluation and testimony by a psychologist to explain mental retardation and its affect on a person who is brain damaged. Without this evidence, much less the ability to obtain this evidence and present it to the state court, there is no presumption of correctness afforded to the state court decision. Testing and expert assistance will be necessary for Mr. Martinez-Villareal to present his allegations in support of Claim 4.16 to this court.

12. This Court also has the authority to appoint counsel for Mr. Martinez-Villareal. Section 848(q)(4)(B) of

Title 21 of the United States Code "established a right to preapplication legal assistance for defendants in federal habeas corpus proceedings." *McFarland v. Scott*, 114 S.Ct. at 2572. The language and purposes of § 848(q)(4)(B) and its related provisions establish that the right to appointed counsel includes a right to legal assistance in the preparation of the habeas corpus application." *Id.* Mr. Martinez-Villareal, who is indigent, requests counsel so that he may prepare to seek a stay of execution and reinstate his competency to be executed claim.

13. Although Mr. Martinez-Villareal has been represented by Sean Bruner in the state court proceedings below, and was represented by Mr. Bruner in proceedings in this Court, Mr. Bruner can no longer continue in the representation because he has become an important witness as to Mr. Martinez-Villareal's competency to be executed. Due to past and continuing observations of Mr. Martinez-Villareal made by Mr. Bruner, it may be necessary for Mr. Bruner to be called as a witness at a competency hearing in this Court. Accordingly, Mr. Bruner is not seeking appointment for this proceeding. For that reason, Petitioner requests that the Federal Public Defender for the District of Arizona and Sean D. O'Brien be appointed to represent him in his habeas corpus proceedings. Sean D. O'Brien is the Director of the Public Interest Litigation Clinic in Kansas City, Missouri. He was appointed to represent Mr. Martinez-Villareal in the state court competency proceedings. Mr. O'Brien's continued participation, given the short period of time in which the claim may need to be litigated, is necessary as he is most familiar with the facts of the case, the witnesses and the

proceedings in the state court. Mr. O'Brien possesses the necessary qualifications to be appointed in this matter.[10]

14. Finally, Petitioner requests access to his client to allow the necessary evaluations and testing to take place. DOC does not permit contact visits absent a court order. This Court and the state court previously issued orders that Petitioner be given contact visits with his attorneys and mental health experts. DOC complied with that order. Petitioner asks this Court to issue a similar order so that necessary investigation can be completed.

For all these reasons, Mr. Martinez-Villareal requests the immediate appointment of counsel and necessary experts or access to his client so that counsel may prepare the competency claim, and related pleadings, for consideration by this Court. Given the impending execution date, Petitioner asks that this motion be given expedited consideration.

Respectfully submitted this 13th day of May, 1997.

Fredric F. Kay
Federal Public Defender
Denise I. Young
Dale A. Baich

Sean D. O'Brien

By /s/ Denise Young
COUNSEL FOR PETITIONER

---

[10] A further description of Mr. O'Brien's qualifications are listed in his resume. [Exhibit E.]

Copy of the foregoing
mailed this 13th day of
May, 1997 to:

Bruce M. Ferg
Assistant Attorney General
Office of the Attorney General
400 West Congress, Bldg. S, Ste. 315
Tucson, AZ 85701-1367

/s/ Denise Young

EXHIBIT A

SUPREME COURT OF ARIZONA

STATE OF ARIZONA, **Appellee,** **vs.** **RAMON MARTINEZ-VILLAREAL,** **Appellant.**	**Supreme Court No. CR-83-0207-AP [5963]** **Court of Appeals No. 2 CA-CR 3160** **Santa Cruz County Nos. 4541-A, 4653-A and 4628-A**

WARRANT OF EXECUTION

(Filed April 15, 1997)

The appeal in the above-entitled cause was heard and fully considered by this Court on the 12th day of April, 1984 and having finally decided the cause, this Court on

the 10th day of July, 1985, did affirm the judgment of the Superior Court of Santa Cruz County, State of Arizona, and did file its opinion, which opinion is now of record in this Court, is still in effect, and, as shown by this Court's record, has not been stayed or affected by any subsequent decision of this or any other Court.

WHEREAS, a Warrant of Execution issued by this Court on March 12, 1997 was quashed by order in Martinez-Villareal v. Johnson, No. CV-97-0151-SA, dated April 8, 1997, which order further directed that the execution be set for May 21, 1997,

NOW THEREFORE, IT IS ORDERED, that Wednesday, the 21st day of May, 1997, be and the same is hereby fixed as the time when the judgment and sentence of death pronounced upon the appellant, RAMON MARTINEZ-VILLAREAL, by the Superior Court of Santa Cruz County, State of Arizona, shall be executed by administering to RAMON MARTINEZ-VILLAREAL an intravenous injection of a substance or substances in a lethal quantity sufficient to cause death, except that RAMON MARTINEZ-VILLAREAL shall have the choice of either lethal injection or lethal gas.

IT IS FURTHER ORDERED that the Clerk of this Court forthwith prepare and certify under his hand and the seal of this Court a full, true and correct copy of this Warrant, and cause the same to be delivered to the Director of the Department of Corrections and the Superintendent of the State Prison, at Florence, Arizona, and the same shall be sufficient authority to them for the execution of the appellant, RAMON MARTINEZ-VILLAREAL, as commanded by the judgment and sentence of death

pronounced against RAMON MARTINEZ-VILLAREAL, by the Superior Court of Santa Cruz County, State of Arizona, on the 20th day of May, 1983.

Upon the execution of RAMON MARTINEZ-VILLAREAL, the Superintendent shall, pursuant to Rule 31.17(c), Rules of Criminal Procedure, forthwith make a return upon this Warrant to the Supreme Court of Arizona, which return shall show the time, mode and manner of execution.

Dated in the City of Phoenix, Arizona, at the Arizona Courts Building, this 15th day of April, 1997.

/s/ Thomas A. Zlaket
THOMAS A. ZLAKET, Chief Justice

/s/ Charles E. Jones
CHARLES E. JONES, Vice Chief Justice

/s/ Stanley G. Feldman
STANLEY G. FELDMAN, Justice

/s/ James Moeller
JAMES MOELLER, Justice

/s/ Frederick J. Martone
FREDERICK J. MARTONE, Justice

STATE OF ARIZONA
SUPREME COURT

I, NOEL K. DESSAINT, Clerk of the Supreme Court of the State of Arizona, hereby certify the above and foregoing (2 pages) to be a full and true copy of the WARRANT OF EXECUTION of RAMON MARTINEZ-VILLAREAL, filed by said Supreme Court in the said above-entitled action on this 15th day of April, 1997.

IN WITNESS WHEREOF, I hereunto set my hand and affix the official seal of the Supreme Court of the State of Arizona, this 15th day of April, 1997.

/s/ Noel K. Dessaint
NOEL K. DESSAINT, CLERK

EXHIBIT B

OFFICE DISTRIBUTION
[X] DIVISION
[X] COUNTY ATTORNEY

IN THE SUPERIOR COURT
OF
PINAL COUNTY, STATE OF ARIZONA

Date 05/09/1997

JUDGE HONORABLE BOYD T. JOHNSON
DIVISION 4 ALMA JENNINGS HAUGHT, CLERK
COURT REPORTER none By Melissa A. Rabago, Deputy
ADDRESS & PHONE

THE STATE OF ARIZONA,
Plaintiff,
vs
RAMON MARTINEZ-VILLAREAL,
Defendant(s).

Case No. CR97022291

MINUTE ENTRY
ACTION:

RULING

(Filed May 9, 1997)

PRESENT:

The Court having considered the pleadings of the parties; having reviewed the reports of the mental health experts herein; having reviewed all exhibits admitted into evidence; having considered the testimony of witnesses herein and the arguments of counsel; having considered all relevant legal authority; and upon good cause shown:

FINDS, as follows:

1. That the Defendant, Ramon Martinez-Villarreal, is an inmate in the custody of the Arizona Department of Corrections who has been sentenced to death; that this action was brought by and on behalf of the Defendant, upon a petition filed pursuant to A.R.S. §13-4022, as amended, alleging that the Defendant is not competent to be executed;

2. That A.R.S. §13-4022(E), as amended, provides a presumption that a person who has been sentenced to death is competent to be executed; that it further places the burden upon the defendant to prove by clear and convincing evidence that he is not competent to be executed; that the mental competency at issue in this proceeding is as defined by A.R.S. §13-4021, as amended;

3. That credible testimony and medical evidence was presented at the hearing herein that the Defendant may suffer from a mental illness, mental retardation and/or organic brain damage; credible testimony and medical evidence was likewise presented at the hearing herein that some or all of the symptoms or outward manifestation of those illnesses or conditions may be and may have been exaggerated or contrived by the Defendant; credible testimony and medical evidence was likewise presented at the hearing herein that the Defendant, even if suffering from any or all of those illnesses or conditions, would not necessarily thereby be precluded from being competent to be executed, as defined by law; credible testimony and medical evidence was likewise presented at the hearing herein that the Defendant may not suffer from any of those illnesses or conditions or may suffer in a lesser degree from one or more of those illnesses or conditions and may, in fact, be malingering, as that term was medically defined during the testimony of witnesses;

4. That the determination whether the burden of proof has been met may only be made after a careful review and analysis of all the evidence presented the Court; that, upon review of all the evidence presented the Court, this Court FINDS that the Defendant has failed to prove by clear and convincing

evidence, or by the lesser standard of preponderance of the evidence, that he is not competent to be executed;

5. That the Court FURTHER FINDS that Defendant is aware that he is to be punished for the crime of murder and that he is aware that the impending punishment for that crime is death; that the Defendant, Ramon Martinez-Villarreal, is therefore competent to be executed under the laws of the State of Arizona.

IT IS THEREFORE ORDERED that the petition to find the Defendant incompetent to be executed is denied.

DONE this 9th day of May, 1997.

/s/ Boyd T. Johnson
HONORABLE BOYD T. JOHNSON

EXHIBIT C

GEORGETOWN UNIVERSITY MEDICAL CENTER
Department of Neurology
Jonathan H. Pincus, MD
Professor and Chairman Emeritus

April 1, 1997

Mr. Sean O'Brien
Public Interest Litigation
5319 Rockville Road
Kansas City, Missouri 64110

Re: Ramon Martinez Villa-Real

Dear Mr. O'Brien,

I examined Mr. Ramon Martinez Villa-Real on Monday, March 31, 1997, in the federal penitentiary in Florence, Arizona, and I have reviewed the records that you were kind enough to send. These included the segment from the *Pacific Reporter*, second series, July 10, 1985, pages 670-681, the affidavit of Dr. Garcia-Bunuel concerning his examination on March 5, 1994, and the affidavit of Dr. Joseph Geffen of his examination dated September 21, 1993 and June 22, 1994. I also reviewed the testimony of Dr. Geffen, direct by Mr. Bruner pages 8-73 and the direct testimony of Dr. Garcia-Bunuel pages 143-200. In addition, I saw the physical exams and general medical records, mental health records, medication records, and X-rays and lab tests from the Arizona State Department of Corrections.

My examination and history was performed on March 31, 1997, over a four hour period from 10:30 in the morning to 2:30 in the afternoon. I saw him in response to

your urgent request concerning his competency to be executed. An execution date had already been set some two weeks hence. The history was obtained with Mr. Bruner present in order to allay suspicious feelings concerning my role in his defense and with an interpreter, Ysabelle.

He entered looking somewhat disheveled with about three days growth of beard, and his hair was short but had not been brushed. His posture was flexed in general, and he appeared dejected. He looked down at his hands and played with his fingers for the entire four hours that I was there. I do not think that we established eye contact more than four times and then only briefly. I began by asking him if he knew why I was there. I explained that I was a neurologist, a doctor who takes care of the brain and the nervous system and its diseases. He said that he did not know why I was there. I asked him if he knew how anything I found might be helpful to him, and he claimed not to. I asked him if he knew that he was to be executed, and he claimed not to know what that meant. I asked him if he would come back after the execution, and he said that he does not know what happens afterward. I asked if he would eat and watch TV, and he answered by saying, "I do not get hungry much, and I only watch TV in the afternoons." This lack of responsiveness to the question I had asked was typical. I said to him, "Once you are killed, you would not eat or watch TV." He responded, "Munoz said he is writing a ballad about me."

I had been told that he was married, so I asked him about this. He nodded, "Yes." I said, "Does you wife live in a house?" He looked uncomfortable and said that they were not actually married. I said, "Do you live in a

house?" He indicated that he lived in a house and then corrected that to say that she lived in a house. I said, "Does she live in the house with you?" He said that no, she lived in a house that was near where his house was. I said, "Well, why don't you live together?" He said, "Well, she lives with her husband in a house with her children." It turns out that he visited her occasionally in the evening. In other words, he had a relationship with a woman who was a wife, not his wife. The lack of understanding which was mutual in this case was not just a matter of language. We had a perfectly competent interpreter. It is a matter of retardation and a kind of literalness in the interpretation of words, which is seen in brain-damaged individuals and psychotic individuals.

Because he had been described as disheveled with a beard and matted hair in the past, I asked him about his appearance. He indicated that the guards give him a shave weekly on Sundays and sometimes by force or with threat of force. The reason that he does not like to walk to the bathroom to take a shave is because his legs hurt. I thought that the pains in his legs when he walks may relate to diabetic neuropathy. He is known to have diabetes.

There was some discussion in the records I reviewed of his having enjoyed television and of responding appropriately to television programs by laughing. I asked him about his television viewing, and he told me that he likes to watch the Mexican channels because he enjoys hearing Spanish spoken. He speaks no English. I asked him if he ever watched the soccer matches, and he indicated that sometimes they show soccer matches on the Mexican

channel. I asked if he ever laughs while watching television, and he said that he laughs when soccer players fall down. He denies having a favorite team and denied following the fortunes of any specific team.

He then spontaneously told me about other times he laughs. He talks to himself in his cell, and sometimes he laughs. A guard asked him why he was talking to walls and laughing. He laughed when the guard asked him. Once a guard came into his cell to search him. He laughed, and the guard asked why. Ramon responded, "You are able to speak Spanish, but you only speak English to me." He said to me, "I was not laughing at the guard, but that is what the guard thought."

I asked him how he knew that the guard thought that his laughter was directed at the guard. "Because," he said, "the guard seemed angry," and the guard said to him, 'Que passa?' when he entered his cell. Yet, Ramon was lying on his bed with his face to the wall when he was laughing, so clearly he was not laughing at the guard.

I though [sic] Ramon's interpretation of this incident was a bit paranoid, so I asked him if there were others who were angry at him. This led to a long story about a check, a letter, signing for a check, and receiving a receipt that was not responsive to the issue we were discussing and was a digression, what psychiatrists call loose associations. This is something seen in people who have a thought disorder caused by a neurologic disease of the brain or a psychosis or both.

Then we got back to the subject of anger, and he said that people were angry at him because he had temporarily taken the ear plugs out of his ears that were attached to his radio so that his radio could be heard by others. He said that the guards turned off his light not just the radio, and he continued, "the guard is a jerk. He gave me two sandwiches in the afternoon instead of a regular dinner." Ramon does not know if a doctor ordered this or not because of his diabetes, but "sometimes they don't give me the milk I ask for. They say wait a minute, but they say it wrong. They say, 'Poquito momento.' There is one guard who won't bring me milk. *They* don't bring me milk because they are angry. It makes me feel bad because I haven't done anything bad. The other guys turn on their radios high, and the guards do nothing to them. It makes me feel ashamed."

The picture drawn by Ramon was one of aloneness. The guards are against him, the other inmates are against him, and all without reason.

Ramon had been receiving antipsychotic medication. At one point, he had Navane 5 mg twice a day and was taking Cogentin and/or Artane with it. He had been treated with this was for a number of years, but the antipsychotic medication had been discontinued about a year ago. I asked about the effect on him of stopping that medication. He misunderstood my question or answered another one and started talking about his hearing. It turns out that he has a problem hearing with his left ear. When I asked him about what he does hear that other people can't, he indicated that he hears voices and sometimes sees snakes. I asked about the identity of the voices, and he said that there is a man's voice and a woman's

voice that do not have names. Both tell him to cut himself. The woman's voice is like his dead sister, Maria. She was like a mother to him, and after he was orphaned, she took care of him. He said, "Her children are like my own," and then he cried. He said that she was a half sister. She looked for him when he would go out to work and stay away for several days. She lived on another ranch about one day's walk from where his older brothers and sisters were living in the mountains in a communal agricultural village.

This conversation is not responsive to my question about what happened after he stopped his antipsychotic medication, but I let him continue. He said that his mother and his father treated him better than they treated the other brothers and sisters and protected him because of his illness. They had identified him as being mentally ill early on. He was not able to say how old he was when he began hearing the voices, but he said that when he was 12 or 13 he banged his head against the wall because of voices, and his father used to take him with him on jobs in order to keep an eye on him. His father died when he was 16 or 17 he told us.

Though his father never beat him, he did beat the other children and told the other children not to hit him or tease him because he did not know what he was doing. He was not able to specify what such acts might be, but he said that when his father beat the other children, he used electric extension wire and beat them on their backs as well as their legs. Though he denied any such beatings that were directed at him, it sounds to me as if that may very well have been a very violent home.

We discussed the voices. They are the same as the ones he has always heard, and they tell him to hurt himself. The voices were speaking to him at the time that we conversed and were "telling him to go back to his cell." He said that they keep him up at night. He said that the medicine reduced the voices but did not eliminate them. He wants to take the medication again. The voice is not his sister, but it is her voice. It is mainly the man who tells him to hurt himself. It is not comforting to hear his sister's voice, but it makes it worse.

He expressed intensely ambiguous feelings about two men, Munoz and Ortiz, both of whom have provided him with considerable comfort and speak to him in Spanish and have conversed with him for long periods of time and that others have been extremely cruel to him and taunted him and want him to die. During his account of his relationship with Ortiz, he had a long digression into how he made 31 cups of coffee and had to serve them in the prison.

On examination, he was 4'9". His eardrums were clear. There is a marked hearing deficit in the left ear, and tuning fork applied to his forehead is heard best on the right. This indicates nerve deafness on the left. His head circumference was 55 cm, which is within normal limits. He made no or very little eye contact with me. Eye movements were not smooth but showed saccades in tracking, and there was impersistence of gaze.

Motor examination revealed normal strength and tone throughout. There were no choreiform movements or tremor. There was a right hand and foot preference. He was able to hop briefly on his right foot, but pain made it

impossible for him to do more, and he could not skip. His gait was antalgic. There was no glabellar response, but there was a positive nuchocephalic reflex. Rapid alternating movements were done reasonably well with his palms, fingers, and feet. Sensory examination of primary modalities was intact to vibration, position, and pinwheel, but he extinguished the distal of two simultaneously delivered stimuli on both the right side and the left side. Deep tendon reflexes were 2+ and equal throughout in the upper extremities and the knees but were barely perceptible at the ankles. Plantar responses were flexor bilaterally. There were negative Wartenberg reflexes bilaterally.

There was a positive snout. There was paratonia of both arms and both legs, and he was unable to carry out the Luria two step or three step commands. Cerebellar function as best as could be determined was normal. There was no grasp reflex.

There were scars in the left parietal region and a huge U-shaped on the forehead. There were three long longitudinal scars on his left forearm and his left index finger. He had tried to kill himself by cutting his arm and cutting off his left index finger.

Mini-mental status examination revealed that he did not know the year, the season, the month, or the day of the month, but did know the day of the week, Monday. He knew we were in Arizona but not county, town, or floor, but knew the unit in which he was held at the prison. He required one repetition to remember three words. After he encoded them, he got 2/3 at one minute. He was only able to do one correct subtraction of seven,

not from 100 but from 10. At first he said seven, but then he corrected this to three. He named a pencil and a watch, followed a three stage command. He is not able to read so that he could not read and obey, and he could not write a sentence. His attempt to copy a design was primitive and had evidence of constructional apraxia. He got a score of 13/30 on the mini-mental status exam. His illiteracy may have lowered the score beyond where it would have been had he learned to read and write.

Competency depends upon frontal lobe function and requires a minimal degree of intelligence. This subject is mentally retarded, his IQ 61, and his frontal lobe functions are impaired on neurologic examination.

I have made specific recommendations for neuropsychological assessment to include the Wisconsin Card-Sorting test and Trail-making A and B. His illiteracy may make these tests a challenge for Dr. Geffen. An MRI of his brain could help to explain why his brain is not working properly.

I think it likely that he cannot connect the crime with the punishment and does not understand the result of his punishment. He certainly cannot cooperate effectively in assisting his defense with pleas for executive clemency. He is both schizophrenic and retarded. He is not a fit subject for execution.

Sincerely,

/s/ Jonathan H. Pincus
Jonathan H. Pincus, MD
Professor of Neurology and
Chairman Emeritus

EXHIBIT D

AFFIDAVIT OF DR. JOSEPH GEFFEN

Comes now affiant, Joseph Geffen, Ph.D., and first being duly sworn, states and declares as follows:

1. I am a psychologist duly licensed to practice psychology in the State of Arizona. In that capacity, I have participated in the assessment of the mental condition of Mr. Ramon Martinez-Villareal.

2. My testing, and that of other mental health professionals, indicates that Mr. Martinez-Villareal is mentally retarded, brain damaged, and psychotic. I believe additional testing is necessary to determine the cause and extent of Mr. Martinez-Villareal's disabilities, especially given the gravity of the issues involved.

3. I have asked counsel for Mr. Martinez-Villareal to obtain a neurometric EEG, which measures brain functioning, and an MRI, which can create a visual image of the brain structure. Each test objectively assesses the condition and functioning of the patient's brain, but in different ways. The patient's frontal lobe is responsible for the higher order brain functions necessary to the patient's ability to understand that he is to be executed and why.

4. An MRI is necessary to help detect any structural abnormality of the brain that may account for the organic brain dysfunction indicated by neurological and neuropsychological testing and patient history. Mr. Martinez-Villareal has a history of head injuries, psychotic symptoms, inconsistent and erratic behavior, and autism observed and verified since early childhood. Prison

records reveal disorganized behavior, such as requesting and then refusing medication, that is commonly observed in patients suffering from psychotic and/or organic brain disorders.

5. A neurometric EEG measures electronic impulses produced by the brain. It records electronic activity in the brain which enables doctors to identify and evaluate brain functions. There are subtle defects in the brain that are not detected on traditional EEG testing. The quantitative EEG uses computerized, statistically validated norms to analyze the brain wave activity and create a visual image of brain functioning. By comparing patterns of the patient's brain functions to normative groups, it aids in determining the actual functioning of specific areas of the patient's brain. This is especially critical in examining Mr. Martinez-Villareal's frontal cerebral cortex, which is the seat of higher brain functions, including the ability to understand the abstract concepts necessary to understand the cause-effect relationship between the crime and the punishment.

6. Objective testing is especially important in this case because the issue of malingering has been raised, but is not substantiated with any objective clinical testing. The testing to date establishes beyond question that Mr. Martinez-Villareal's brain functioning is impaired; these additional tests could provide additional objective support for present clinical findings.

7. In addition to these tests, it would be important to obtain an examination by an expert in the area of mental retardation, preferably one who is bi-lingual. Having reviewed records in the prison and the reports of

DOC physicians, it appears that behavior consistent with mental retardation is being misinterpreted as indicia of competence. Traditional psychological tests for mental retardation are not available in Spanish, so it would be necessary to engage an expert with substantial experience with mentally retarded subjects. Although Mr. Martinez-Villareal is brain damaged and psychotic, his impairment is significantly exacerbated by his extremely limited intellectual functioning. An expert familiar with mental retardation is necessary to complete the clinical picture of this very impaired individual.

FURTHER, AFFIANT SAYS NAUGHT.

/s/ Joseph Geffen Ph.D.
Dr. Joseph Geffen, Ph.D.

State of Arizona)
) ss
County of Pima)

Subscribed and sworn before me this 8th day of April, 1997.

/s/ Ana illegible nee:Salcido
Notary Public

My Commission expires:
6-28-97

OFFICIAL SEAL
[SEAL] ANA SALCIDO
Notary Public – Arizona
PIMA COUNTY
My Comm. expires June 28, 1997

EXHIBIT E

SEAN D. O'BRIEN
5319 Rockhill Road
Kansas City, Missouri 64110
(816) 363-9371

BAR MEMBERSHIP: Missouri Bar; Federal District Court, Western District of Missouri; United States Court of Appeals, Eighth Circuit; United States Supreme Court

EDUCATION: University of Missouri-Kansas City, J.D., 1980; Northwest Missouri State University, B.A., English, Communications, highest honors, 1977.

APPOINTMENT AND POSITIONS: Executive Director, Public Interest Litigation Clinic (formerly the Missouri Capital Punishment Resources Center). The Clinic represents death row inmates in all stages of trial and appeal. (October, 1989 – present)

Adjunct Professor, UMKC School of Law. Courses taught since 1985 include Problems and Issues in the Death Penalty, Death Penalty Representation Clinic, Public Defender Trial Clinic, Public Defender Appeal Clinic.

Public Defender, Jackson County, Missouri. Director of an urban public defender office representing poor people in all varieties of

criminal proceedings. (January, 1985 – September, 1989)

Assistant Public Defender, Jackson County, Kansas City, Missouri. Defended poor people in felony cases, including death penalty defense, in trial, appeal and postconviction proceedings. (March, 1981 – December, 1984).

President, Missouri Association of Criminal Defense Lawyers, 1992-93

Missouri Alliance for the Mentally Ill, Chair, Forensic Committee, 1992-present

Chairman, Missouri Bar Criminal Law Committee, 1989 – 1992

PROFESSIONAL AWARDS:

Missouri Association for Social Welfare, Annual Award, 1994

Missouri Coalition to Abolish the Death Penalty Annual Award, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

RAMON MARTINEZ-VILLAREAL, Petitioner, vs. **TERRY STEWART, et al.,** Respondent.	No. CIV-86-296-TUC-RMB **ORDER** (Filed May 14, 1997)

Petitioner has filed with this court a Motion for Expert Services and/or Access to Client and Appointment of Counsel. The Petitioner does not presently have a claim pending before this Court. Previously, the Petitioner brought a claim before this Court regarding his competency to be executed and other issues. The Court ruled on the other issues and denied the claim regarding competency to be executed, finding that the competency to be executed claim was premature because, at that time, an execution date had not been set. *See* Order and Memorandum Opinion dated October 21, 1994. An execution date of May 21, 1997 has now been set, and Petitioner plans to reinstate his claim regarding his competency to be executed.

Title 21 U.S.C. § 848(q)(4)(B) entitles capital defendants to legal representation in proceedings pursuant to 28 U.S.C. § 2254 or § 2255. The Supreme Court has stated that § 848(q)(4)(B) provides that "the right to appointed counsel adhere prior to the filing of a formal, legally sufficient habeas corpus petition." *McFarland v. Scott*, 512

U.S. 849, 855, 114 S.Ct. 2568, 2572 (1994). Accordingly **IT IS ORDERED** that the Federal Public Defender for the District of Arizona and Sean D. O'Brien **SHALL BE APPOINTED** to represent the Petitioner in habeas corpus proceedings before this Court. **IT IS FURTHER ORDERED** that this Court will hold a telephonic hearing regarding the Motion for Expert Services and/or Access to Client on May 15, 1997 at 2:30 p.m.

Dated this 14th day of May, 1997.

/s/ Richard M. Bilby
Richard M. Bilby
Senior United States
District Judge

GRANT WOODS
ATTORNEY GENERAL

BRUCE M. FERG
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(STATE BAR NUMBER 003544)

ATTORNEYS FOR RESPONDENTS

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

RAMON MARTINEZ-VILLAREAL, PETITIONER, -vs- TERRY L. STEWART, et. al, RESPONDENTS.	PREVIOUS CAUSE NUMBER: CIV 86-296-TUC-RMB[1] RESPONSE TO MOTION FOR EXPERT SERVICES AND/OR ACCESS TO CLIENT AND APPOINTMENT OF COUNSEL

Respondents oppose this motion for several reasons, and urge this Court to deny all of the requested relief.

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[1] Inasmuch as CIV-86-296 has come to an end through the appellate decision and mandate of the Ninth Circuit, and this Court's order of March 24, 1997, denied Petitioner's "Motion to Reconsider Order and Judgment," it is certain that that case is complete, and that anything more which will be litigated in this Court constitutes a new, yet-to-be-filed case. Hence, some means of referring to such new activity, which will not confuse it with the finalized first petition, should be applied.

1. *Because this is* [sic] *motion contemplates a successive petition, this Court lacks jurisdiction to take any action.* It is undisputed that Petitioner has already had one federal habeas proceeding, which has been litigated to its conclusion. This Court has recognized as much in its prior orders of May 6 and May 8, 1997. Therefore, the litigation Petitioner is attempting to initiate now plainly is a successive petition, subject to the requirements of 28 U.S.C. § 2244(b), as amended by the Antiterrorism and Effective Death Penalty Act of 1996, and this Court is forbidden to entertain it in any fashion, since Petitioner has not obtained permission from the Ninth Circuit to proceed.

Counsel for Respondents is aware that the Court stated in its order of March 24, 1997, that it did not intend to treat the "incompetency to be executed" claim as a successive petition. However, recent authority not mentioned in that order and probably unknown to the Court indicates that Petitioner's competency to be executed claim should be treated as successive, regardless of the fact that it may not have been "ripe" when presented in Petitioner's first petition. That the "factual predicate for the claim could not have been discovered previously through the exercise of due diligence" is only part of the requirements for excepting a petition from the rule against successive petitions; it must also be shown that if the facts underlying the claim were proved, "no reasonable fact finder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2244(b)(2)(B)(ii).

The Ninth Circuit has recognized the clear intendment of this language, that claims related only to sentence, even a death sentence, simply cannot be entertained in a successive petition. *Greenawalt v. Stewart*,

105 F.3d 1268, 1277 (9th Cir.), *cert. denied*, 117 S. Ct. 794 (1977) (allegation of ineffective assistance of counsel in capital sentencing not permitted as successive petition); *Greenawalt v. Stewart*, 105 F.3d 1287, 1288 (9th Cir.), *cert. denied*, 117 S. Ct. 794 (1977) (denying permission to file a successive petition which would attack lethal injection as mode of execution because it "is not relevant to the question whether he is guilty of murder in the first degree"). Following the clear statutory language and the two *Greenawalt* holdings, the Eleventh Circuit specifically ruled that a claim of incompetency for execution under *Ford v. Wainwright*, 477 U.S. 399, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986), cannot be raised in a successive petition. *In re Medina*, 109 F.3d 1556, 1564-65 (11th Cir. 1997).

It therefore is clear that what is contemplated is a successive petition, which this Court lacks any authority to deal with.

> Instead of filing a pleading in the district court attempting to evade the provisions of 28 U.S.C. § 2244(b), as amended, Medina should have begun by filing in this Court an application seeking a certificate permitting him to file a second application in the district court, as required by § 2244(b)(3)(A). Because Medina did not obtain such a certificate, the district court correctly dismissed his habeas application, denied his motion for a stay of execution, and denied his application for a certificate of appealability.

(*Id.* at 1564.) The same is true of Petitioner. Nor does it make any difference that what is being sought is appointment of counsel and funding of experts, as supposedly

authorized by 21 U.S.C. § 848(q)(4), construed in *McFarland v. Scott*, ___ U.S. ___, 114 S. Ct. 2568, 129 L. Ed. 2d 666 (1994). *McFarland* involved neither unexhausted claims nor a successive petition, both of which are present here. Moreover, all of the relevant statutes must be read together, *Sterling v. Scott*, 57 F.3d 451, 456-58 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 715 (1996). Section 848(q)(8) says that counsel appointed pursuant to that statute shall represent the person in *"available* judicial proceedings," including *"available* post-conviction process." Unless the Ninth Circuit grants permission to proceed with the successive petition, there simply is no "available" process, and no basis for either appointment of counsel or any of the other relief requested.

This conclusion is reinforced by the recognition that the only purpose for appointing experts and authorizing funding for testing is to hold an evidentiary hearing in this Court. However, § 2254(e)(2)(B) of the amended habeas statute allows for evidentiary hearings in the district courts only if there has been a failure to develop a factual basis in the state courts *and*, again, the applicant shows that no reasonable fact finder would have found him *guilty*. Thus, there can be no evidentiary hearings in this Court, whether the petition is successive or not, on an issue unrelated to the determination of guilt. Competency for execution certainly does not qualify. This Court is not authorized to engage in a futile expenditure of federal funds where no federal evidentiary hearing can ever take place.

2. *This Court cannot authorize expenditures concerning an unexhausted claim.* It is undisputed that this claim remains unexhausted; Petitioner has a petition for special

action pending in the Arizona Supreme Court seeking review of the trial court's determination of competency, as authorized by the statute, A.R.S. § 13-4022(G). As support for his contention that this Court possesses jurisdiction to grant the orders he seeks, Petitioner cites just two authorities. (Motion at 5.) One is *McFarland v. Scott*, which we have already seen is distinguishable by the fact that it involved neither a successive petition nor one including an unexhausted issue. The other is *Calderon v. U.S. Dist. Ct., Eastern Dist. of California*, 1997 WL 183877 (9th Cir. Apr. 16, 1997.). It, too, involved a first petition, not a successive one. It remarks that the district court's dismissal of a mixed petition (so that there was no formal petition pending) did not, in and of itself, require denial of fees under Section 848(q), because *McFarland* determined that a mere request for counsel was enough to initiate a proceeding. (*Id.* at *6.) However, it then went on to state:

> The district court is not required to grant the application, however. *See Sterling v. Scott*, 57 F.3d 451, 457-58 (5th Cir. 1995) (affirming decision that section 848(q)(9) fees request did not survive dismissal of mixed petition), *cert. denied*, ___ U.S. ___, 116 S. Ct. 715, 133 L.Ed.2d 669 (1996).

(*Id.*) The result is ambiguity, because the decision seems to say both that a district court can "consider" a fees application in a case where there is an unexhausted claim, and that the existence of an unexhausted claim is an appropriate ground for terminating fees. What *is* clear is that on at least three other occasions the Ninth Circuit has granted mandamus, directing that discovery orders

be vacated because there was no properly exhausted petition pending in the district court, and prohibiting the issuance of such orders until such a properly exhausted petition was filed. *Calderon v. U.S. Dist. Ct., Northern Dist. of California (Nicolaus)*, 98 F.3d 1102 (9th Cir. 1996); *Calderon v. U.S. Dist. Ct., Northern Dist. of California (Hill)*, 110 F.3d 714 (9th Cir. 1997); *Calderon v. U.S. Dist. Ct., Eastern Dist. of California*, 1997 WL 219500 (9th Cir. May 5, 1997). Thus, the great weight of authority in this circuit holds that there is no right to discovery orders, absent a fully exhausted petition, and that should be true, regardless of the particular mechanism for discovery which a petitioner attempts to utilize. In *Shaw v. Delo*, 971 F.2d 181, 188 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 1301 (1993), the Court of Appeals concluded that a competence for execution claim should have been dismissed by the district court, because it had not been exhausted in the state courts, and "Because the merits of Shaw's incompetence claim were not properly before the district court, we also conclude the district court correctly denied Shaw's motion for funds for investigative and expert services to determine his competence to be executed." These cases strongly indicate that to grant what Petitioner requests would amount to a clear error of law.

3. *Even if the Court possesses authority to fund the tests and experts Petitioner requests, to do so would be an abuse of the Court's discretion.* The very same requests presented to this Court were presented to Judge Boyd Johnson of the Pinal County Superior Court and denied by him. Those were correct rulings and, even if this Court believes it possesses the authority to grant Petitioner's requests, it too should deny them.

Two types of testing are being requested. (Motion at 6.) The first sort is magnetic resonance imaging (MRI) of Petitioner's brain. However, in a report which Petitioner has not supplied to the Court, Petitioner's own affiant, Dr. Geffen, conceded that, "Although an MRI test could be useful, the results would mostly shed light with respect to 'structural' abnormalities of the brain as opposed to functional ones." (Exhibit 1 hereto at 5.) This amounts to a concession that the MRI testing will not produce any relevant information, because this Court is no more concerned with obtaining abstract information about the structural abnormalities of Petitioner's brain than Judge Johnson was, but only with the single narrow issue of whether he understands that he is to be executed because he has been convicted of murder. If anything, that is a "functional" issue, which Geffen says the MRI will not address. Thus, the delay (undoubtedly the real point of this motion), transportation difficulties, etc., involved in arranging for such testing of Petitioner would be utterly pointless.[2]

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[2] The addition of Dr. Jonathan Pincus' letter as support for the MRI (Motion at 6 and Exhibit C) should not influence this Court. Dr. Pincus is virtually a professional defense witness in capital cases. *Bonin v. Calderon*, 807 F. Supp. 589, 598 n.9 (C.D. Cal. 1992). The IQ he states, 61, is an error, as he admitted at the hearing; it is a misquotation of Dr. Geffen's report to this Court, which found an IQ of 64. That level is merely "mildly" retarded. DSM IV at 40. A recognized neurologist from Phoenix testified to Judge Johnson that the additional tests would not provide an answer to the question being asked (competency for execution); "Saying that somebody has frontal lobe damage or brain damage, saying that somebody is mentally retarded, it does not really address that issue in any specific way." (Ex. 2 at 75, 71.)

The situation is similar with regard to the other sort of testing suggested, the "neurometric EEG," which Geffen's report at 5 indicates is also known as "computerized EEG" or "brain mapping." This Court should know that the Arizona Court of Appeals upheld exclusion of "brain electrical activity mapping (BEAM)" evidence in a first degree murder case, where the system was described as "a computerized method of displaying and interpreting EEG . . . data," because "there was substantial evidence from which the court could conclude that BEAM is not generally accepted in the neurological community." *State v. Zimmerman*, 166 Ariz. 325, 327-29, 802 P.2d 1024, 1026-28 (Ct. App. 1990). As a merely experimental procedure, it was not something the court needed to receive as evidence. (*Id.*) The same result was reached in the only other case concerning brain mapping discovered by counsel for Respondents, *Head v. Lithonia Corp., Inc.*, 881 F.2d 941 (10th Cir. 1989). Thus, Petitioner wishes this Court to grant a stay of his execution to allow for testing of a sort not even accepted within the relevant medical circles. The Court should also be aware that a regular EEG was conducted of Petitioner in 1993, and found to be normal. Strangely enough, Dr. Geffen's affidavit does not even mention that test, let alone explaining the need now to have another EEG, let alone one which is merely experimental in nature.

Equally unpersuasive is the request for an evaluation by Dr. Dennis Keyes. Dr. Keyes is touted as an expert in the area of mental retardation. The Court should recall that the defense has already had Petitioner examined by the following experts, who testified on his behalf: Dr. Geffen (psychologist); Dr. Garcia-Bunuel (psychiatrist);

Dr. Imaz (psychiatrist); and Dr. Pincus (neurologist). None of those individuals was reticent about expressing an opinion that Petitioner suffers from mental retardation or some other organic brain defect and, of course, the witnesses presented by the State before Judge Johnson – two psychiatrists (Drs. Kurke and Johnson), a psychologist (Dr. McCauley), and a neurologist (Dr. Tamm) also discussed the matter. Thus, the matter was fully explored in the state court proceeding. Keyes is not necessary, he is redundant. The issue of malingering which the motion posits as a reason for bringing Keyes in at this late date has been disputed by the parties for years (as this Court knows from the hearing held before it in 1994), so it is not some sudden and unforeseen new development which could not have been dealt with before.

The pointlessness of appointing Keyes is evident. Paragraph 7 of Geffen's affidavit (Motion Exhibit D) suggests that Petitioner be examined yet again, by "an expert in the area of mental retardation, preferably one who is bi-lingual." The Geffen affidavit ignores the fact that a bilingual examiner – himself – has twice attempted to go beyond mere interviews to conducting psychological testing of Petitioner and has been essentially unsuccessful on both occasions. His report of 10/31/93 discounted the results of both the IQ test and "test for screening for organic impairment of brain functions" administered on that occasion because of the "psychotic processes" supposedly then operating, and his most recent report (dated 4/2/97) indicates that Petitioner claimed inability to do tests because of poor eyesight. The Court may recall that Petitioner cooperated with Dr. Youngjohn in 1994 for only a brief time and then walked out of the examination. Dr.

McCauley testified that she was prepared to do some testing of Petitioner as part of her evaluation, but he refused to cooperate. Thus, Petitioner's cooperation even with his own experts has been minimal, and he has made clear his determination not to cooperate at all in testing conducted by Respondent's experts.

Thus, the likelihood of obtaining any reliable information from Petitioner by means of psychological testing is negligible, but it is precisely such testing which is Keyes' forte. One case involving another death-sentenced defendant lists half a dozen tests administered by him to that prisoner (which was not an exhaustive list), and concludes that the result was "a thicket of numbers, acronyms, and medical terminology" which was "inconclusive" and "indeterminate at best." *Fairchild v. Lockhart*, 900 F.2d 1292, 1297-98 and n.5 (8th Cir.), *cert. denied*, 497 U.S. 1052 (1990). This apparently is Keyes' typical mode of operation. In a more recent death penalty case, his testimony (and that of another defense witness) were discounted on the bases that, "Both doctors spent the bulk of their interview time with [the defendant] administering tests," rather than talking to that defendant, and that these witnesses "always testified for the defense." *Washington v. Johnson*, 90 F.3d 945, 952 (5th Cir. 1996). In neither case was his testimony found persuasive. And nothing in the Motion suggests that he is bi-lingual, one of the primary qualifications for an additional expert suggested by Geffen.

Nothing in the Motion gives any reason to believe that Keyes will be able to accomplish anything more with Petitioner than conduct another interview (which is simply repetitive of what half a dozen other experts already

have done), and even if some testing could be accomplished by him, the virtual certainty that Petitioner will not cooperate with any non-defense person attempting similar testing would cause an unfair disparity in access to evidence which would be grounds for precluding the evidence. The Vineland Scale as described in the Motion at 7 apparently is just a structured interview of people who have had contact with the subject, and no good reason is provided why this could not have been done years ago by Geffen (who has been involved with Petitioner's case since 1993) or some other local expert. Hence, there is no reason to believe that anything helpful will be accomplished by the appointment of Keyes.

CONCLUSION

The Court does not possess the jurisdiction to issue the orders which the Motion requests, and even if it did, the reasons presented for doing so are so meritless that granting the motion would constitute an abuse of discretion. This motion is a transparent attempt to achieve a backdoor stay of execution and the Court should not lend its dignity to such gameplaying. The requests should all be denied and Petitioner directed to take the issue to the Ninth Circuit, where it should have been presented in the first place.

DATED this 14th day of May, 1997.

Respectfully submitted,

GRANT WOODS
ATTORNEY GENERAL

/s/ Bruce M. Ferg
BRUCE M. FERG
ASSISTANT ATTORNEY GENERAL
ATTORNEYS FOR RESPONDENTS

COPIES of the foregoing were FAX'd and deposited for mailing this 15th day of May, 1997, to:

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/s/ Mary Lou Reinhardt
MARY LOU REINHARDT

CRM86-0720
CR860720.ex2

EX. 1

* * *

performed. Although an MRI test could be useful, the results would mostly shed light with respect to 'structural' abnormalities of the brain as opposed to functional ones. I communicated to the client's attorney that I would specially recommend a specific procedure (computerized EEG, also known as neurometric EEG, 'brainmap' and qEEG), since the question of malingering was raised. This

procedure does not depend on any client self report, but is based on fairly direct measurement of electrical activity of the brain and comparing the results to computerized norms for patients with affective, psychotic, and organic disorders, as well as normal individuals.

In normative mental health treatment of schizophrenic and other psychotic patients, medication begins to be given very early even if the diagnosis has not been definitely confirmed, on a presumptive basis, in order to reduce the patients' suffering and help them become less disorganized. It is puzzling to me why Mr. Villareal is not being medicated at this stage, when the question of his competence to be executed is being raised. Perhaps the medication could help him to become competent, if he is not.

Regarding the report of 'malingering,' I am not satisfied, based on the record and the interview observed, that any credible psychological evaluation was performed upon which such a conclusion could be based. In fact, it is incredible that with all the history revolving around Mr. Villareal's behavioral problems and the many years in the institution, that there is no report of any formal psychological evaluation performed by the institutional mental health staff. What little assessment seems to have been reported, there is a glaring absence of Spanish Language or culturally sensitive professional treatment other than by paraprofessional staff, even though the psychological and psychiatric literature has maintained for quite some time that this should be the standard for language and cultural minority patients. If there is not adequate appropriately trained staff at the facility to provide evaluations meeting such standards, this could have and still can be

obtained by drawing from outside resources. There are Spanish speaking psychiatrists and psychologists in the Tucson, Phoenix and Casa Grande areas who are available to be called in.

Finally, I would like to comment regarding my understanding that legally, those being asked by the condemned prisoner's attorney, through a court order, to provide an evaluation to determine competence to be executed be given full access to all the information that is obviously available to the institutional staff serving the prosecutor. In my opinion this was not followed in this case either in the letter or the spirit of the law, from my standpoint; it was a matter of "too little and too late." Given the available data, it is my opinion that Mr. Villareal does not meet the mental standard that would correspond

* * *

EX. 2

IN THE SUPERIOR COURT OF
THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PINAL

STATE OF ARIZONA, Plaintiff, vs. RAMON MARTINEZ-VILLAREAL, Defendant.	)	No. CR 97-022291

BEFORE THE HONORABLE BOYD T. JOHNSON

Florence, Arizona
May 7, 1997
8:40 o'clock a.m.

PREPARED FOR:
ATTORNEY GENERAL
(Copy)

Mesa Court Reporting
265 North Gilbert Road, #2151
Mesa, Arizona 85203
(602) 964-8507
By: Leisel Akins, RPR

* * *

[p. 71] seen of the reports, that the defendant is not competent?

I believe in answer to the question Mr. O'Brien asked you, you couldn't rule out that he was incompetent but you can't also rule out, can you, Doctor, that he is competent?

A That's correct. That's correct.

Q So, in other words, if we ask the other half of the question that Mr. O'Brien didn't ask, is that you can't rule out the fact that he's competent; is that correct?

A You're correct, yes.

Q And it's also true, is it not, Doctor, that the diagnoses of Dr. Pincus do not preclude the finding that the defendant is competent to be executed; is that correct?

A No. None of these diagnoses really addresses that issue. Saying that somebody has frontal lobe damage or brain damage, saying that somebody is mentally retarded, it does not really address that issue in any specific way.

Q So that doesn't preclude the finding by this Court that he's competent to be executed; is that correct?

A That's correct.

* * *

[p. 75] determination. That was your question?

MR. WILKES: Right. And I wanted the doctor to answer that.

THE COURT: Well, what I'm going to do, sir, is, I'm going to answer it and say that when reviewing all the reports, I made the determination in my ruling of whether I refuse or decline to order additional testing, that it was not relevant. And I based it in part on what Dr. Tamm put in his report, plus other information available to me.

Does that satisfy what you want for a record?

Dr. Tamm, would you say it's not – it would not be beneficial to have those additional tests?

THE WITNESS: I don't think it will tell you – I don't think it will give you the answer to the question you're asking.

THE COURT: Okay.

MR. WILKES: I have no further questions.

THE COURT: And that was an offer of proof. I am not taking that testimony itself. I have relayed on the record what my decision was, was to not have the additional testing.

MR. BRUNER: Judge, can I just get the last word on that in?

* * *

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

RAMON MARTINEZ-VILLAREAL, Petitioner, vs. TERRY STEWART, et al., Respondents.	**CAPITAL CASE** **EXECUTION SCHEDULED FOR 5-21-97** No. CIV-86-296 TUC RMB REPLY TO RESPONSE TO MOTION FOR EXPERT SERVICES AND/OR ACCESS TO CLIENT AND APPOINTMENT OF COUNSEL AND SUPPLEMENTAL EXHIBIT

Counsel for petitioner attempted to challenge his competence for execution before this Court in 1994. At that time, respondent objected on the grounds that the issue was not ripe, and that is should be raised at a later

time. Now respondent has changed his position, saying that the competence issue cannot now be raised in a "successive" petition because it is unrelated to his guilt or innocence of the crime. If examined literally, respondent's argument is that the Antiterrorism and Effective Death Penalty Act effectively deprives all federal district courts of jurisdiction to enforce the Eighth Amendment prohibition on the execution of the insane. Nothing in the legislative history or text of the statute indicates an intent to divest the federal courts of jurisdiction to enforce any right recognized under the federal constitution.

The constitutional nature of the right at issue in this case is not open to question. The Supreme Court has definitively ruled that the Eight [sic] Amendment "prohibits a state from carrying out a sentence of death upon a prisoner who is insane." *Ford v. Wainwright*, 477 U.S. 399, 409-410 (1986). Since *Marbury v. Madison*, the power and duty of the federal courts to enforce the constitution has been beyond dispute. Though some restrictions were placed upon the writ of habeas corpus in the recent legislation, Congress continued to respect the role of federal courts to interpret the Constitution:

> In the great 1803 case of Marbury v. Madison, Chief Justice John Marshall explained for the Supreme Court that "it is emphatically the province and duty of the judicial department to say what the law is." Section 104(3) would be subject to serious constitutional challenge if it were red [sic] to preclude the Federal Courts from making an independent determination of "what the law is" in cases within their jurisdiction. I expect that the courts, following their usual practice of construing ambiguous statutes to

> avoid constitutional problems, will read section 104 to permit independent Federal Court review of constitutional claims based on the Supreme Court's interpretation of the Constitution and Federal Laws.

Statement by President William Jefferson Clinton upon signing S. 1965, April 24, 1996, 1996 WL 517206. Respondents, however, seeks to limit the power of this Court by procedural artifice – first by defending the issue in prior proceedings on the ground that it should be raised now, and now claiming that it should have been ruled upon then. As discussed below, in a similar situation, the seventh circuit recently rejected a state's abuse of the writ of argument that "would have the effect of mouse trapping [the petitioner]." *Burris v. Parke*, 95 F.3d 465, 469 (7th Cir. 1996) (en banc).

Here, after successfully persuading this Court in the earlier proceedings in this matter that Petitioner's claim that he was incompetent to be executed was "not now ripe for determination" and should be brought when an execution "warrant has been issued," *Martinez-Villareal v. Lewis*, CIV 86-296-TUC-RMB, Reply to Response to Motion for Summary Judgment, at 45-46 (Dec. 17, 1993), Respondents now take a completely contrary position and claim that this claim is now too late, and can never be heard by a federal court. Respondents do so despite the fact that Petitioner did exactly as Respondents, and this Court, told him to do: reassert this claim after a warrant of execution issued. Petitioner is scheduled to be executed at 12:05 a.m. on May 21, 1997.

On these facts, there is no question but that Respondents are judicially estopped from taking this inconsistent position in this Court. As the Ninth Circuit has explained,

> the doctrine of judicial estoppel, sometimes referred to as the doctrine of preclusion of inconsistent positions, is invoked to prevent a party from changing its position over the course of judicial proceedings when such positional changes have an adverse impact on the judicial process.

Russell v. Rolfs, 893 F.2d 1033, 1037 (9th Cir. 1990). The doctrine is "intended to protect the integrity of the judicial process by preventing a litigant from 'playing fast and loose with the courts." *Helfand v. Gerson*, 105 F.3d 530, 533 (9th Cir. 1997) (quoting *Russell v. Rolfs*, 893 F.2d at 1037). In *Russell*, the Ninth Circuit applied the judicial estoppel doctrine to prevent the state from taking a directly contrary position under circumstances strikingly similar to those presented here. There, the state "persuaded the district court to deny [the habeas corpus petitioner] federal review on the ground that he had an 'adequate and available' state remedy" to exhaust his claim. *Id.*, at 1038. However, once the petitioner returned to state court, the state "disregarded its previous representation in federal court and argued the petition was procedurally barred because [the petitioner] had raised the same issues on direct appeal." The state court ultimately agreed, and found the claim procedurally defaulted. However, when the petitioner returned to federal court, the state argued that the petitioner "was procedurally barred from presenting his claim in federal

court." *Id.* at 1037. The appellate court held that the state's earlier action estopped it from taking this entirely different position. *See also, Yniguez v. State of Arizona*, 939 F.2d 727 (1991) (Attorney General judicially estopped from "about-face" where he sought "an outcome [in the appellate court that was] directly contrary to the result he sought and obtained in the district court").

Respondents contend that the changed circumstances brought about by the amendments to 28 U.S.C. § 2244(b) contained in the Antiterrorism and Effective Death Penalty Act ("AEDPA") support their "about-face." That contention is unavailing. As another circuit court recently explained when a state offered a similar argument following passage of the AEDPA:

> Application of the new law to [petitioner's] case would, thus, . . . have the effect of mousetrapping [the petitioner]. It would cause him to forfeit a legal remedy on which his life, may literally depend."

Burris v. Parke, 95 F.2d at 469. In *Burris*, the petitioner filed a federal habeas corpus action challenging only his conviction because the appeal from his capital resentencing hearing was still pending in the state courts. After his habeas petition was denied by the federal courts, the petitioner filed a second federal habeas petition challenging his now exhausted capital sentencing claims. While the second habeas petition was pending on appeal, the AEDPA was enacted. *Id.*, at 467-468. The state claimed that because the AEDPA did not allow challenges to sentences in a second habeas petition, the petition had to be immediately dismissed.

The circuit court, however, concluded otherwise. It found that the new changes contained in the AEDPA did not apply to Burris because at the time the first habeas petition was filed, all parties, including the state, believed Burris could file a second petition challenging his sentencing issues once they were exhausted in the state courts. The court noted that the hearing transcript on the first petition gave "no hint" that proceeding this way "might have precluded [Burris from] filing a second petition limited to the sentence, and in fact the "silences are deafening." Under these circumstances, the court concluded that:

> the state's silence concerning the implications of an immediate decision on the petition was tantamount to a statement that for the sake of a prompt decision on the merits of Burris's challenge to his conviction the state would forgo the defense of abuse of the writ should he file a subsequent petition limited to the sentence.

Id., at 470. As a result, the "state forfeited any defense" preventing the claims to be heard on the merits in the second petition.

Here, the state was not silent. It forcefully and vociferously argued that Petitioner's competency to be executed claim was premature, and as a result the Court did not yet have jurisdiction to here [sic] it:

> [T]his issue is not ripe for decision, because no execution can take place without the issuance of a warrant of execution, no such warrant concerning Petitioner presently exists, and the Arizona Supreme Court apparently is not issuing such warrants concerning defendants who are protected (as is Petitioner) by a federal stay of

> execution. Moreover, mental competency, of course, can change over the course of time. Thus, the claim presents nothing more than a possibly future injury, which is insufficient to satisfy the Art III 'case or controversy' requirement, and there currently is no issue over which this Court properly has jurisdiction."

Martinez-Villareal v. Lewis, CIV 86-296-TUC-RMB, Reply to Response to Motion for Summary Judgment, at 45 (Dec. 17, 1993). Claiming Petitioner's desire to have the claim decided at that time was "unworkable," Respondents stated that it was important to:

> have a single adjudication of competency, *at a time when all [petitioner's] other claims have been resolved and a warrant has been issued, so that an execution actually is imminent within a reasonable period of time . . . To do a competency determination now would be futile, because it will certainly have to be repeated when the time for execution finally arrives.*

Id.

Now that everyone has relied on this position, including Mr. Martinez-Villareal whose very life depends on his reliance, this Court should hold Respondents estopped from taking this "about-face."

Just as it is clear that the proceeding in this Court is not a successor corpus proceeding,[1] so too is it clear that

---

[1] Respondents are also wrong in their contention that counsel cannot be appointed in a successor habeas petition. *Weeks v. Jones*, 100 F.3d 124, 128 (11th Cir. 1996) (district court erred legally and procedurally in denying appointment of

this Court has the authority to appoint counsel, which has been done, and to consider the issues now before the Court. Mr. Martinez-Villareal has "a right to preapplication legal assistance . . . in federal habeas corpus proceedings[,]" and this assistance extends to services that may be critical in the preapplication phase of a habeas corpus proceeding. *McFarland v. Scott*, 512 U.S. 849, ___, 114 S.Ct. 2568, 2572 (1994) *citing* 21 U.S.C. § 848(q)(9); *see also Calderon v. United States District Court for the Eastern District of California (Gordon)*, ___ F.3d ___, 1997 WL 183877, at *1, *6 (9th Cir. Apr. 16, 1997) (A post conviction proceeding within the meaning of § 848(q)(4)(B) begins upon the filing of a motion requesting the assistance of counsel and the court has discretion to provide counsel with assistance to prepare for federal habeas efforts.) *McFarland* and *Gordon* are not at all ambiguous. The assistance Mr. Martinez-Villareal is now seeking is available under the law.

Respondents' attempt to have this Court dismiss Mr. Martinez-Villareal's meritorious constitutional claims without the benefit of resources authorized under 18 U.S.C. § 848 is also inconsistent with the power of this Court to provide indigent litigants the resources to challenge an unconstitutional sentence of death. Again, the statute has not rendered this Court impotent with respect to the adjudication of the factual aspects of a constitutional claim. Again, the President observed:

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counsel in successor habeas petition challenging capital defendant's competency to be executed).

> Section 104(4) limits the evidentiary hearings in Federal habeas corpus cases when "the applicant has failed to develop the factual basis of a claim in State court proceedings." If this provision were read literally to deny litigants a meaningful opportunity to prove the facts necessary to vindicate their constitutional rights, it would raise serious constitutional questions. I do not read it that way. The provision applies to situations in which "the applicant has failed to develop the factual basis" of his or her claim. Therefore, section 104(4) is not triggered when some factor that is not fairly attributable to the applicant prevented evidence from being developed in state court.

Statement by President William Jefferson Clinton upon signing S. 1965, April 24, 1996, 1996 WL 517206. Petitioner seeks only those resources which he requested and was denied by the state courts, and which are relevant to the issue-injected by the state – of whether he has the mental faculties to successfully dupe treating physicians for almost ten years.

The issue of mental retardation and malingering is important in this case in light of the circular reasoning of the state's experts – that Mr. Martinez-Villareal's manipulative behavior, itself a symptom of retardation and brain damage – proves his awareness of his crime and punishment. The services of an expert in mental retardation is critical to a reliable resolution of this issue. As Dr. Denis W. Keyes, Ph.D., explains in his letter to Sean D. O'Brien, dated May 13, 1997, attached as Exhibit F, and offered as further support for the requests made in ¶¶ 10, 10.1, 10.2 and 10.3 of the Motion for Access:

> The reports of Dr. Joseph Geffen, Dr. Jonathar. Pincus, and Dr. Leonardo Garcia-Bunuel are exceptional examples of thorough mental health examinations that strongly indicate the existence of mental retardation. However, none of these can be considered conclusive in their diagnoses since each lacks a formal evaluation of the client's adaptive skill functioning (see AAMR, 1992; DSM IV, 1994) . . .
>
> Testing procedure for people who have mental retardation require advance planning in several areas. People with mental retardation often attempt to "pass" for normal by assuming a posture of false-awareness and false-ability, known as the "Cloak of Competence" (Edgerton, 1966). For most people with little or no experience in the field of mental retardation, including many mental health professionals, this usually harmless deception may sometimes appear to be behavior one might merely regard as eccentric. . . .
>
> Conversely, examiners, particularly those with little or no experience working with people who have retardation, have sometimes accused examinees of malingering or faking mental retardation . . .
>
> The most glaring omission in each and all of the previously performed evaluations is the complete lack of any type of adaptive behavior scale or instrument. As stated, it is impossible to determine the existence or severity of mental retardation in an examinee unless his/her adaptive behavior (or adaptive skill levels) have been investigated.

Exhibit F, attached.

Because the State's witnesses in this case are clearly not familiar with mental retardation, much of Petitioner's behavior which is attributable to this serious disability was dismissed as evidence of malingering. The fact that Respondents refer to Mr. Martinez-Villareal's mental retardation as "merely mild" reflects a lack of understanding of the nature and severity of Petitioner's intellectual limits. Dr. Keyes could explain that mild mental retardation simply describes Mr. Martinez-Villareal with respect to other mentally retarded persons and that compared with individuals of normal intellectual functioning, he is severely impaired. Furthermore, it is unfair to dismiss Dr. Keyes' credibility without giving him an opportunity to evaluate Mr. Martinez-Villareal and testify simply because he has provided testimony in other cases. Respondents neglect to mention one case in particular, *In the Matter of Charles Lee Mathenia,* in which a Missouri Associate Circuit judge relied upon Dr. Keyes's testimony in finding a condemned prison [sic] incompetent for execution based solely on "mild" mental retardation.

This Court's earlier ruling that the *Ford* issue in this case is not successive or abusive should stand. It is consistent with the majority of courts that have considered the issue:

> Moreover, our research indicates no reported decision in which a federal circuit court or the Supreme Court has denied relief of a petitioner's competency-to-be executed claim on grounds of abuse of the writ.

Barnard v. Collins, 13 F.3d 871, 878 (5th Cir. 1994). That case also held that the district court abused its discretion in refusing to extend to Barnard the benefit of 18 U.S.C.

§ 848, which provides for the appointment of counsel and reasonably necessary investigative, expert and other services. *Id.* at 879.

In conclusion, petitioner asks this Court to reject Respondents' attempt to finesse the jurisdiction of this Court to enforce the constitution.

Respectfully submitted this 15th day of May, 1997.

Fredric F. Kay
Federal Public Defender
Denise I. Young
Dale A. Baich

Sean D. O'Brien

By /s/ Denise I. Young
COUNSEL FOR PETITIONER

Copy of the foregoing mailed and
transmitted by facsimile on
this 15th day of May, 1997 to:

Bruce M. Ferg
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/s/ Denise I. Young

EXHIBIT F

Denis William Keyes, Ph.D.
Department of Educational Foundations
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School of Education – The College of Charleston
Charleston, South Carolina 29424

Mr. Sean O'Brien, J.D.
Public Interest Litigation Clinic
5319 Rockhill Road
Kansas City, MO 64110

re: Arizona v. Ramon Martinez-Villareal

May 13, 1997

Dear Mr. O'Brien,

My name is Denis William Keyes, and I am currently a tenured faculty member in the Department of Educational Foundations and Specializations at the University of Charleston, South Carolina. I received my Doctor of Philosophy Degree in Special Education from the University of New Mexico in May, 1992. I also hold a Master of Education in Special Education, a Master of Science and an Educational Specialist Degree in School Psychology from Miami University, Oxford, Ohio. I have worked in the field of mental retardation since 1974, was a teacher of students who have mental retardation from 1979 to 1984. I have been state certified as a school psychologist since 1988 (in Ohio, New Mexico (sic), and South Carolina), Nationally Certified since 1989, and am a Diplomate of the American Board of Forensic Examiners. I have consulted for numerous legal protection and advocacy agencies (particularly in the areas of mental retardation, special education and the criminal justice system), and have testified as an expert witness in both criminal and

civil justice suits in both state and federal courts. In my research, I have published several articles in the field of mental retardation, most of which deal with legal issues. Since 1988, I have been active in cases involving the death penalty and offenders with mental retardation. I should like to preface my statement by saying that I am not particularly against the imposition of the death penalty either personally, morally, or philosophically. However, I am vehemently opposed to the execution of people who have mental retardation.

I am making this statement concerning the case of *Arizona vs. Ramon Martinez-Villareal*. My concerns about this case are myriad, first and foremost because there is enough evidence to suggest that this man has mental retardation, but none of the examinations performed so far have included all the areas of assessment necessary for a proper diagnosis. Additionally, any finding that Mr. Martinez-Villareal is competent cannot be considered exhaustive until his actual mental functioning has been determined beyond a reasonable doubt.

The reports of Dr. Joseph Geffen, Dr. Jonathan Pincus, and Dr. Leonardo Garcia-Bunuel are exceptional examples of thorough mental health examinations that strongly indicate the existence of mental retardation. However, none of these can be considered conclusive in their diagnoses since each lacks a formal evaluation of the client's adaptive skill functioning (see AAMR, 1992; DSM IV, 1994).

There are several important facts to consider in any diagnosis of this man's mental condition:

1. Ramon Martinez-Villareal has experienced extreme poverty;
2. He is culturally very different from most American citizens;
3. He is a Mexican National who speaks virtually no English;
4. He is diabetic, a disorder of metabolism that can cause progressive damage to the brain;
5. He is functionally illiterate and has had no formal education;
6. He has been diagnosed as paranoid schizophrenic, a severe mental illness that can lead to mental retardation (see AAMR. 1992);
7. He is described as both mentally retarded & capable by various psychologists who have limited, if any, experience with mental retardation; and,
8. He has evidenced concrete, circular and illogical thought processes.

Testing procedures for people who have mental retardation require advanced planning in several areas. People with mental retardation often attempt to "pass" for normal by assuming a posture of false-awareness and false-ability, known as the "Cloak of Competence" (Edgerton, 1966). For most people with little or no experience in the field of mental retardation, including many mental health professionals, this usually harmless deception may sometimes appear to be behavior one might merely regard as eccentric. In Mr. Martinez-Villareal's case, his 'cloak of competence' may be practiced enough to convince even experienced psychologists and psychiatrists, resulting in an incorrect diagnosis of below-average intellect or

malingering, instead of the correct diagnosis of mental retardation. Certain tests, when correctly administered and scored, can more effectively determine intellectually abnormal behavior. Of the tests that have been administered, only one was clearly a diagnostic test for mental disabilities. However, even if more appropriate testing instruments were used, there is simply no substitute for actual testing and teaching experience with those people who have mental retardation (see generally, Conley, Luckesson, & Bouthilet, 1992).

It is of serious concern to me that those people who have interacted with Mr. Martinez-Villareal consistently note variation in his level of functioning. Sattler (1988), in discussing testing procedures for people with mental retardation, reports that behavior during testing that is " . . . negativistic may enable the retarded . . . to maintain self-esteem in the face of difficult intellectual or social demands" (p. 95). Additionally, an examinee's persistent questioning of an examiner may "represent an effort to ensure stability" in responding, thus "fooling" the *examiner* into an incorrect judgment of heightened competence. Conversely, examiners, particularly those with little or no experience working with people who have retardation, have sometimes accused examinees of malingering or faking mental retardation. Research indicates that it is not possible for an examinee to fake mental retardation on tests of intelligence, and maintain consistent intelligence scores (Keyes, 1992). Mr. Martinez-Villareal's scores have been remarkably consistent over time. It would also appear that, while malingering has been proposed, there is no consistent evidence to back up its existence.

The statement by Mr. Marciano Munoz, M.A., that Mr. Martinez-Villareal is "rational and his thought content is logical" is highly questionable, given the content of his entry for February 27, 1997. On this date, Mr. Martinez-Villareal stated that he would "hurt himself" if he was not moved because of the pressure of being near a particular inmate whom Mr. Martinez-Villareal believed was harassing him. As stated in Mr. Munoz's record, this has happened before, and Mr. Martinez-Villareal has hurt himself before. The odd thing is that both Mr. Munoz and his supervisor, Dr. McCauley, seemed to miss a resulting pattern that is quite clear: First, Mr. Martinez-Villareal moves to a cell, begins to experience voices and harassment, complains that he must be moved or he will hurt himself, is moved to another cell – fully believing that moving to another cell block will take care of the problem, and then the voices and harassment start once again. Such thinking is neither rational or logical – but it is the sort of circular, concrete thought expected of a man with mental retardation and mental illness.

The most glaring omission in each and all of the previously performed evaluations is the complete lack of any type of adaptive behavior scale or instrument. As stated, it is impossible to determine the existence or severity of mental retardation in an examinee unless his/her adaptive behavior (or adaptive skill levels) have been investigated. Given this fact, the continuance of this case is an absolute must, if only in order to see that Mr. Martinez-Villareal's adaptive skill functioning is accurately determined so that the court can be *fully* informed as to the severity of his present mental condition.

In cases of severe or profound mental retardation, it is often impossible for the trained psychologist to perform accepted standardized assessment procedures. This is because people with such severe disabilities often lack even the basic skills for testing procedures. However, the nature of mild or educable mental retardation is sometimes so subtle that evaluators who lack experience with people who are mentally retarded may question or deny their test results. It is quite possibly for this very reason that Dr. Geffen has expressed that he is somewhat unsure of his intellectual diagnosis of Mr. Martinez-Villareal. Psychologists who make diagnoses of mentally normal or retarded based primarily upon an interview format have little understanding of the severe and sometimes beguiling nature of this disability, even in its mild form.

It is my professional opinion that evaluations previously performed represent a good investigation into the evaluation of Mr. Martinez-Villareal's current functioning. At best, however, I am unclear as to why an inventory of adaptive behavior was not performed, since it is absolutely necessary for diagnosing mental retardation. The absence of a strategy for assessing adaptive skill areas indicates the examiner(s) may not be very familiar with the definition and various behavioral aspects of mental retardation. For such an important evaluation, a psychologist with expertise in the field of mental retardation would have been far more appropriate than one lacking expertise in the field.

If you have any concerns or questions, please feel free to contact me at (803) 953-4840, or (803) 762-3681.

Sincerely,

/s/ Denis W. Keyes
Denis W. Keyes, Ph.D.
Nationally Certified School Psychologist
Diplomate of the American
Board of Forensic Examiners
Assistant Professor of Special Education
The College of Charleston/University
of Charleston, SC

copy: Mr. Dale Baich
FAX (602) 379-3681

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

RAMON MARTINEZ-VILLAREAL, Petitioner, vs. TERRY L. STEWART, et al., Respondents.	)	No. CIV-86-296-TUC-RMB **ORDER** (Filed May 16, 1997)

Ramon Martinez-Villareal ("Petitioner"), a death row inmate, is before the Court seeking expert services pursuant to 21 U.S.C. § 848(q) so that his competency to be executed claim can be developed and presented to the Court. His execution is set for May 21, 1997. Section 848(q) permits the Court to provide the services of experts in the preapplication phase of a habeas corpus proceeding. The State opposes the requested relief, asserting that the Petitioner's Motion for Expert Services contemplates a successive petition and, therefore, the Court lacks jurisdiction to take any action.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") contains provisions curtailing the scope and availability of federal habeas corpus relief for prisoners, including those under sentence of death. In particular, the AEDPA amends the habeas corpus statutes to provide that a second petition presented to a district court must be dismissed unless it presents a claim that either 1) "relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," or 2) that is

based on facts that could not have been discovered earlier "through the exercise of due diligence" and if proved would "establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the [the Petitioner] guilty of the underlying offense." 28 U.S.C. 2244(b)(2). Before the district court may consider a second or successive application permitted be [sic] § 2244(b)(2), the applicant must make a motion in the Court of Appeals for an order authorizing the district court to consider the application. *See* 28 U.S.C. 2244(b)(3)(A). A claim of lack of competency to be executed does not fall within either of the exceptions set forth in § 2244(b)(2).

The issue of whether the Petitioner is competent to be executed was raised before this Court in his March 25, 1993 Amended Petition. The State argued that the competency to be executed claim was not ripe for decision because the Petitioner's competency could change over time and because the Petitioner was not under a present warrant of execution. On October 21, 1994, this Court found that the Petitioner did not receive effective assistance of counsel at sentencing and remanded for resentencing. *See* Order and Memorandum Opinion of October 21, 1994. The Court also agreed with the State and found that because the Petitioner was not presently under a warrant of execution, the competency to be executed claim was premature and dismissed that claim without prejudice. *See id.* The remaining claims were denied with prejudice. *See id.* On appeal, the Ninth Circuit Court of Appeals reversed the Court's decision on the ineffective assistance of counsel claims, stating that they were procedurally barred, and affirmed in all other

respects. *See Martinez-Villareal v. Lewis*, 80 F.3d 1301 (9th Cir.), *cert. denied* ___ U.S. ___, 117 S.Ct. 588, 136 L.Ed.2d 517 (1996). On February 28, 1997, the Court issued an amended order which comported with the mandate of the Ninth Circuit.

The AEDPA, which changed the law related to successive habeas corpus petitions, was passed after this Court's October 21, 1994 ruling on the Amended Petition. In its October 21, 1994 Order, this Court did not contemplate that deciding the issue of whether the Petitioner is competent to be executed would constitute a successive petition. In fact, the Court's Order denying the Petitioner's Motion for Reconsideration specifically recognized that the issue would not be treated as a successive petition. *See* Order of March 25, 1997.

After a review of the pleadings and oral argument, this Court concludes that, as result of the AEDPA, it does not have jurisdiction to entertain the relief sought by the Petitioner. *See In re Medina*, 109 F.3d 1556 (11th Cir. 1997); *Greenawalt v. Stewart*, 105 F.3d 1268 (9th Cir. 1997). Congress may constitutionally limit the jurisdiction of the courts. *Landgraf v. USI Film Products*, 511 U.S. 244, 273, 114 S.Ct. 1483, 1501, 128 L.Ed.2d 229 (1994). The Court agrees with the Petitioner that the AEDPA effectively deprives all federal district courts of jurisdiction to entertain second petitions raising Eighth Amendment "competency to be executed" claims. However, this does not mean that the Petitioner has forfeited his legal remedies. First, the Petitioner may apply for certiorari review of the state court competency proceedings with the United States Supreme Court. The Petitioner may also file an original habeas application to the United States Supreme

Court. *See Felker v. Turpin*, ___ U.S. ___, 116 S.Ct. 2333, 2338-39, 135 L.Ed.2d 827 (1996) (the provisions of section 2244(b), as amended, do not restrict the Supreme Court's original habeas authority). Finally, the Petitioner may apply to the Court of Appeals for permission to proceed in the district court. Thus, although the Petitioner cannot bring his Eighth Amendment competency to be executed claim in this Court at this time, he is not precluded from federal review of this claim.

Although this Court may not review the Petitioner's competency to be executed at this time, the Court recalls that it had the opportunity to observe the the [sic] Petitioner in 1994. This Court can only state that its observations of the Petitioner in 1994 called into serious doubt the Petitioner's competence. At the three-day evidentiary hearing before this Court on the Petitioner's original amended petition, the State psychiatrist testified that if the Petitioner was presently incompetent, it was because he was not receiving the correct medication. The Court then asked the psychiatrist if that meant that the State could medicate in order to eradicate. The expert answered "yes." The report of Dr. Jonathan Pincus, dated April 1, 1997, states that the Petitioner has not been receiving medication. *See* Exhibit C to Motion for Expert Services. This fact alone raises serious concerns in the mind of this Court as to whether the Petitioner is presently capable of understanding 1) that he is to be punished by execution, and 2) why he is being punished. Without more guidance from the Ninth Circuit or the United States Supreme Court, this Court concludes that it lacks jurisdiction to review the state court proceedings

below to ensure that the Petitioner is receiving his medication and, therefore, is competent to be executed.

Dated this 16th day of May, 1997.

/s/ Richard M. Bilby
Richard M. Bilby
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

RAMON MARTINEZ-VILLAREAL, Petitioner, vs. TERRY L. STEWART, et al., Respondents.	)	No. CIV-86-296-TUC-RMB **ORDER** (Filed May 16, 1997)

On April 24, 1996, the "Antiterrorism and Effective Death Penalty Act of 1996" (the "Act") was signed into law, amending 28 U.S.C. § 2244, 2253, 2254, 2255, Appellate Rule 22, and 21 U.S.C. § 848(q). Rule 22(b) of the Federal Rules of Appellate Procedure, as amended, provides that if an appeal is taken by a petitioner, the district judge who rendered the judgment shall either issue a certificate of appealability or state the reasons why such a certificate should not issue. Section 2253 of Title 28, United States Code, as amended, provides that a certificate may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." In the certificate, the court must indicate which specific issues satisfy this showing. 28 U.S.C. § 2253(c)(3).

Concurrently with this Order, the Court issued an Order denying Petitioner's Motion for Expert Services ("Motion"). This Court concluded that, without more guidance from the Court of Appeals or the United States Supreme Court, it lacked jurisdiction. The Court is satisfied that, through his incompetence to be executed claim,

the Petitioner has made a substantial showing of the denial of a constitutional right.

Dated this 16th day of May, 1997.

/s/ Richard M. Bilby
Richard M. Bilby
Senior United States District Judge

CAPITAL CASE: EXECUTION SCHEDULED FOR 12:05 A.M. MAY 21, 1997

No. 97-80229

IN THE

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RAMON MARTINEZ-VILLAREAL,
Petitioner/Appellant,
vs.
TERRY STEWART, et al.,
Respondents/Appellees.

No. 94-99011, 94-99012

IN THE

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RAMON MARTINEZ-VILLAREAL,
Petitioner/Appellant,
vs.
SAMUEL LEWIS, et al.,
Respondents/Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

MOTION FOR CERTIFICATE OF PROBABLE CAUSE; MOTION FOR REMAND TO FILE FED.R.CIV. P 60(B) MOTION; MOTION FOR LEAVE TO FILE SUCCESSOR PETITION; MOTION TO RECALL THE MANDATE AND MOTION FOR STAY OF EXECUTION

INTRODUCTION

This case has previously been before this Court. *Martinez-Villareal v. Lewis*, 80 F.3d 1301 (9th Cir. 1996). In disposing of it, however, this Court reserved judgment on one issue: whether Mr. Martinez-Villareal was competent to be executed. *Id.* at 1309, n.1. It did so on the ground, urged by Respondents, who had earlier persuaded the District Court of the same thing, Order and Memorandum Opinion, Oct. 21, 1994 [Doc. No. 136], at 19, that this claim was "premature." On remand, the District Court entered an order dismissing the petition "without prejudice" so that this claim could be timely brought. Petitioner moved for reconsideration under Fed.R.Civ.P. 59, pointing out to the court that it could lose jurisdiction to consider the reserved issue because of the enactment of the Antiterrorism and Effective Death Penalty Act ("AEDPA"). Respondents did not respond to the motion. The District Court denied the Rule 59 motion, stating clearly its belief that it could still consider the issue, and specifically stating that the claim would not be "treat[ed]" as "successive." Order, Mar. 24, 1997. Respondents remained silent, filing nothing to inform the court it

disagreed with this position. To preserve jurisdiction, Petitioner filed notice of this appeal.

During this same time, Respondents sought and obtained a warrant of execution. Proceedings were then held in the Arizona state court regarding Petitioner's competency. After denying Petitioner's requests for expert assistance and testing, the state court ruled that Petitioner was competent, although it did not resolve the disputed facts, except to note that there is credible evidence on both sides. While the statutory review to the Arizona Supreme Court is pending, Petitioner filed a request for appointment of counsel and expert assistance or access with the District Court. In response, Respondents argued for the first time that the District Court had lost all jurisdiction under the AEDPA. At oral argument, the District Court said that, although it had grave reservations about Petitioner's competency (based on its previous observations) and thus believed the claim had merit, it believed it had lost jurisdiction over the case due to the dismissal of this petition and the passage of the AEDPA.

Petitioner is thus caught in a Catch 22, an unparalleled inequity: He has a substantial claim his execution would be unconstitutional. The District Court and this Court previously refused to address this saying it was premature. The District Court then dismissed the petition in the belief it could reconsider this claim later. Respondents sat back silently and permitted this without registering disagreement or indicating they had changed their previous position that the case could be brought back. Now Respondents have asserted that federal jurisdiction

to consider this erious [sic] constitutional claim has been lost, as an unintended result of the District Court's action.

MOTIONS

Petitioner has brought this appeal, and makes the following motions, to correct this pending injustice:

1. In *Martinez-Villareal v. Stewart*, No. 97-99009, Petitioner moves for the following relief:

(a) A certificate of probable cause permittig [sic] him to appeal from the District Court's order dismissng this petition "without prejudice," and its denial of the motion for reconsideration of that order;

(b) Alternatively, leave to file a motion for relief from the judgment under Fed.R.Civ.P. 60(b);

(c) Alternatively, leave to file a successor petition ini [sic] the District Court upon exhaustion of state remedies.

2. In *Martinez-Villareal v. Lewis*, No. 94-99011 and 94-99012, Peittioner [sic] moves the Court to recall its mandate and amend its decisioni [sic] to retain federal jurisdiciton [sic] overy [sic] his present competency claim.

3. In both causes, Petitioner moves for a stay of his execution pending a resolutioin [sic] of all federal proceedings with regard to Petitioner's competency to be executed.

Petitioner also moves this Court for a stay of execution pending further proceedings in this Court or before the District Court.

FACTS

The facts supporting these requests are:

1. Petitioner is mentally retarded with an I.Q. of 64 and mentally ill, and he is unaware of his pending execution and the reasons for it. In 1993, in his first appearance before the District Court, Mr. Martinez-Villareal, through counsel, alleged that he "did not and does not have the mental capacity to appreciate the nature of his sentence." Amended Petition for Writ of Habeas Corpus ("Habeas Petition"), filed Mar. 26, 1993 at ¶ 4.16.[1] Since Mr. Martinez-Villareal did not and does not have the mental capacity to appreciate the nature of his sentence, under *Ford v. Wainwright*, 477 U.S. 399 (1986), his rights under the Eighth and Fourteenth Amendment would be violated if he is executed. *Id.* at ¶ 106.

2. In the 1993 District Court proceedings, Respondents, however, persuaded the District Court that it did not have jurisdiction to hear the claim because it was "not now ripe for determination" and should be brought when an execution "warrant has been issued." They said:

> [T]his issue is not ripe for decision, because no execution can take place without the issuance of a warrant of execution, no such warrant presently exists, and the Arizona Supreme Court apparently is not issuing such warrants concerning defendants who are protected (as is Petitioner) by a federal stay of execution."

[1] The then-known facts supporting the claim were outlined in ¶¶ 25 through 90 of the habeas petition.

Martinez-Villareal v. Lewis, CIV 86-296-TUC-RMB, Reply to Response to Motion for Summary Judgment, at 45-46 (Dec. 17, 1993). Describing Petitioner's desire to have the claim decided at that time as "unworkable," Respondents stated that it was important to:

> have a single adjudication of competency, *At a time when all [petitioner's] other claims have been resolved and a warrant has been issued, so that an execution actually is imminent within a reasonable period of time . . . To do a competency determination now would be futile, because it will certainly have to be repeated when the time for execution finally arrives.*

Id. (emphasis added).

3. The District Court adopted Respondents' position:

> At present, there is no execution warrant outstanding as to Martinez-Villareal since this Court issued its stay. Thus, Martinez-Villareal is not facing execution nor with appellate review will he face likely execution in the near future. *This claim is premature and denied without prejudice.*

Order and Memorandum Opinion, Oct. 21, 1994, at 19 (emphasis added).

4. The District Court did issue the writ of habeas corpus as to Mr. Martinez-Villareal's death sentence after concluding that he did not receive the effective assistance of counsel. Order and Memorandum Opinion, Oct. 21, 1994, at 30.

5. On appeal, this Court found that the writ was improperly granted because Mr. Martinez-Villareal's

claim of ineffective assistance of counsel was procedurally barred. *Martinez-Villareal v. Lewis*, 80 F.3d at 1305. This Court explicitly stated, however, "[t]o eliminate any ambiguity, we reiterate that the claim of Martinez-Villareal's current incompetence was denied as premature by the district court. That decision was not challenged on appeal. *Our instruction to enter judgment denying the petition is not intended to affect any later litigation of that question.*" *Id.* at 1309, n.1 (emphasis added).

6. On remand to the District Court, the District Court entered an order again denying, "without prejudice," Mr. Martinez-Villareal's competency challenge. Order and Entry, Feb. 28, 01997 [sic]. [Doc. Nos. 152 and 153]. Petitioner, however, moved to amend the judgment pursuant to Fed.Civ.P. Rule 59 "direct[ing] the Court's attention" to the AEDPA [the amendments to the federal habeas corpus statutes encted [sic] in 1996] and quoted 28 U.S.C. § 2244(b)(1), (b)(3)(A) and § 2255. Petitioner summarized the possible effect of these new enactments, noting:

> In other words, petitioner's claim to incompetence to be executed would be barred notwithstanding this Court's dismissal "without prejudice." This would contravene the clear intention of the parties, violate due process under the Fifth and Fourteenth Amendments, and constitute an unconstitutional suspension of the writ of habeas corpus in violation of Art. I, Sec. 9 of the Constitution.

Martinez-Villareal v. Stewart, No. CIV 86-296-TUC-RMB, Motion to Reconsider Order and Judgment (Mar. 11, 1997). Petitioner urged the District Court "[i]n the interests of fairness," "in an abundance of caution," and to prevent "a cruel injustice" that would result if "petitioner's challenge was barred as a successive claim," to reconsider the order dismissing this claim, and hold "the issue in abeyance pending the outcome of the current proceedings" ongoing in state court. *Id.* at 2. Respondents did not respond.

7. The District Court denied Petitioner's motion, stating that the reason the competency to be executed claim was dismissed was because "it was not ripe when it was presented. For this reason, the Court dismissed it without prejudice." Noting that Petitioner "warn[ed] the Court that the premature claim could be precluded as a successive claim" by the AEDPA, the Court stated that it "has no intention of treating the 'incompetency to be executed' claim as a successive petition." Order, Mar. 24, 1997 [Doc. No. 155], at 1. Again, Respondents said nothing before or after this order was issued.

8. On April 17, 1997, Petitioner filed this appeal to preserve federal jurisdiction. The District Court denied a "certificate of appealability." *Martinez-Villareal v. Stewart*, No. CIV 86-296 TUC RMB, Order (May 8, 1997).[2] The appeal from the District Court's Order denying the Rule 59 motion is presently before this Court.

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[2] This order was mistakenly based on the provisions of the AEDPA governing certififdates [sic] of appealability, although those provisions are inapplicable to cases, like this one, filed prior to the effective date of those statutory amendments. *See Naddi v. Hill*, 106 F.3d 275, 276 (9th Cir. 1997).

9. On April 15, 1997, the Arizona Supreme Court issued a second execution warrant setting Mr. Martinez-Villareal's execution for 12:05 a.m. on Wednesday, May 21, 1997. *State v. Martinez-Villareal*, No. CR-83-0207 AP (Ariz. Apr. 15, 1997). A hearing was held in the Pinal County Superior Court on April 6, May 6, 7 and 8, 1997, to determine whether Mr. Martinez-Villareal was competent to be executed. At the state court hearing, substantial evidence and testimony established that Mr. Martinez-Villareal continues to experience symptoms of a major psychotic disorder, which was traced back to his childhood, and that his condition is compounded by mental retardation and brain damage. The state claimed that Mr. Martinez-Villareal is malingering all of these conditions.

10. Prior to and during the hearing, counsel for Mr. Martinez-Villareal asked the Arizona state court for leave to conduct a MRI scan and neurometric EEG of Mr. Martinez-Villareal and for an expert specializing in the field of mental retardation to examine Mr. Martinez-Villareal. Counsel explained that the accusation that Mr. Martinez-Villareal was malingering his condition, and that he made statements reflecting an awareness of his crime and punishment, increased the need for a reliable determination of the issues of brain damage and mental retardation. All of the requests were denied by the state court and the hearing went forward without Petitioner having an opportunity to present such evidence.

11. A day after the conclusion of the evidence the state court determined, *inter alia*, that:

> Credible testimony and medical evidence was presented at the hearing herein that the Defendant may suffer form [sic] a mental illness, mental retardation and/or organic brain damage; credible testimony and medical evidence was likewise presented at the hearing herein that some or all of the symptoms or outward manifestations of those illnesses or conditions may be and may have been exaggerated or contrived by the Defendant; credible testimony and evidence was likewise presented at the hearing herein that the Defendant, even if suffering from any or all of those illnesses or conditions, would not necessarily thereby be precluded from being competent to be executed, as defined by the law. . . .

State v. Martinez-Villareal, No. CR-97022291, Minute Entry (May 9, 1997). The state court then summarily concluded Mr. Martinez-Villareal failed to prove that he was not competent to be executed, and thus he was aware that he is to be punished for the crime of murder and that the punishment for that crime is death. *Id.*

12. The next court day, Monday, May 12, 1997, Mr. Martinez-Villareal filed a special action with the Arizona Supreme Court, as required under A.R.S. § 13-4022(G), to review the lower court's order, and a motion to stay his execution. On Tuesday, May 13, 1997, the Arizona Supreme Court issued an order stating that it "will try to resolve the issues" by May 16 or May 19, 1997. *Martinez-Villareal v. Pinal County Superior Court, et al.*, No. CV-97-0206-SA (May 13, 1997).

13. On May 13, 1997, Mr. Martinez-Villareal moved the District Court for appointment of counsel and expert assistance or access to him so that his competency to be executed claim could be fully developed and presented in the District Court in his supplemental petition. *Martinez-*

Villareal v. Stewart, No. CIV-86-296 TUC RMB, Motion for Expert Services and/or Access to Client and Appointment of Counsel (May 13, 1997).[3] On May 14, 1997, the District Court issued an order appointing counsel and scheduling a conference regarding the motion for expert services or access on May 15, 1997, at 2:30 p.m.

14. On May 15, 1997, Respondents responded to the request for appointment of counsel and expert services or access *and for the first time*, claimed that the District Court *"lacks jurisdiction to take any action"* because the claim is "successive." *Martinez-Villareal v. Stewart*, No. CIV-86-296 TUC RMB, Response to Motion for Expert Services and/or Access to Client and Appointment of Counsel (May 15, 1997) at 1 (emphasis in original). Respondents contended that under newly amended 28 U.S.C. § 2244(b), Petitioner's claim "simply cannot be entertained in a successive petition." *Id.* at 2.

15. Petitioner filed a reply, asking the District Court to find Respondents judicially estopped from this about-face because Mr. Martinez-Villareal had in good faith relied on Respondents' assurances that this claim would be considered by the District Court at the right time.

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[3] Petitioner had earlier sought appointment of counsel which had been denied by the District Court. In response to that motion, Respondents never mentioned its belief that the District Court had no authority to consider the supplemented *Ford* claim. Instead Respondents took no position on appointment of counsel and merely asked the District Court "in the interests of clarity" to assign "an appropriate new cause number to be used in these proceedings so that there would be "some means of referring to such new activity." *Martinez-Villareal v. Stewart*, No. CIV 86-296-TUC-RMB (Mar. 28, 1997).

Martinez-Villareal v. Stewart, No. CIV-86-296 TUC RMB, Reply to Response to Motion for Expert Services and/or Access to Client and Appointment of Counsel (May 15, 1997).

16. At the hearing, the District Court, Judge Richard Bilby, expressed serious concerns that he had no jurisdiction to consider the claim based on Respondents' argument that the AEDPA withdrew his jurisdiction. Judge Bilby stated that he believed Mr. Martinez-Villareal was severely ill and mentally retarded and was not malingering. He also said he had grave concerns about his competency. He said he based these conclusions, in part, on his own observations.[4] As a result, although Judge Bilby said he wanted to hear this claim, he believed he had no jurisdiction to do so.[5]

ARGUMENT

I. A Certificate of Probable Cause Should Issue.

Petitioner moves this Court[6] pursuant to 28 U.S.C. § 2253, for a certificate of probable cause permitting him

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[4] In 1994, the District Court held a hearing on Petitioner's presence [sic] competency. The District Court never resolved that issue, ultimately deciding it was premature, and granting Petitioner relief on his claim of ineffective assistance of counsel at sentencing.

[5] In an order just received from the Disttrict [sic] court, Judge Bilby states that he has "serious concerns in the mind of this Court as to whether the Petitioner is presently capable of understanding" that he is to be executed and why he is being punished. Exhibit A.

[6] The District Court just issued today a certificate of probabble [sic] cause from an order it issued today on a related

to appeal the Court's order dismissing the petition and denying reconsideration of the order of dismissal.[7] A certificate should issue if the issues raised are " 'debatable among jurists of reason' " and ones which "a court could resolve in a different manner." *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983). There is no question that this appeal presents debatable issues.

The District Court's order of dismissal "without prejudice" and its decision denying reconsideration of that order, were – according to the Respondents themselves – based on a legal misconception: a belief that the District Court would not be required to "treat[] the 'incompetency to be executed' claim as a successive petition." Order Denying Reconsideration at 1. If Respondents are correct, and the AEDPA bars the District Court from considering any further petitions in this matter, now that this one has been dismissed, the District Court's denial of reconsideration was based on an error of law, and was therefore an abuse of discretion. See *Del Monte Dunes v. Monterey*, 95 F.3d 1422, 1426 (9th Cir. 1995); *Flores v. Shakala*, 49 F.3d 562, 567 (9th Cir. 1995); *Maulding v. United States*, 257 F.2d 36 (9th Cir. 1958) (denial of new trial reviewed for abuse of discretion or error of law). Respondents' own newly-adopted position that the District Court was wrong in its belief that it could consider the

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matter: Petitioner's request for expert assistance and access to him. See Exhibit B.

[7] Because this case is governed by prior law and not by the recently enacted 1996 Habeas Corpus Amendments, a certificate of probable [sic] is the necessary and appropriate authorization for appeal. See *Haddi v. Hill*, 106 F.3d 275, 276 (9th Cir. 1997); *Jeffries v. Wood*, 103 F.3d 827 (9th Cir. 1996).

"incompetency to be executed" claim after dismissal of this petition, alone establishes there is probable cause for this appeal.

Even if Respondents are not correct, substantial and debatable issues are clearly presented here. Respondents' changed positions and deceptive conduct raise a serious issue as to whether they should be estopped from raising any procedural objection to the federal review of Petitioner's competency claim. *See Russell v. Rolfs*, 893 F.2d 1033 (9th Cir. 1990), *cert. denied*, 111 S.Ct. 2915 (1991). In addition, the District Court's order, if interpreted to bar federal consideration of Petitioner's previously asserted cliam [sic], could constitute a denial of due process and a suspension of the writ of habeas corpus, sufficiently serious to require an exception to the procedural bars the AEDPA could otherwise impose. *Cf. Burris v. Park*, 95 F.3d 465, 469 (7th Cir. 1996) (en banc) (exception to 7th Circuit's determination that the AEDPA is retroactive required in similar circumstances).

These issues are novel and difficult. Whatever their correct disposition may be, however it is plainly not the one the District Court gave in dismissing the petition below and denying reconsideration of that dismissal. Even the Respondents assert that. A certificate of probable cause to review the District Court's order should therefore be issued.

II. Leave Should Be Granted To Allow Petitioner to File A Rule 60(b) Motion.

Alternatively, this Court should grant Petitioner leave to file a Rule 60(b) motion in the District Court.

Carriger v. Lewis, 971 F.2d 329, 331 (9th Cir. 1992). Based on the conference that took place May 15, there is little doubt that the District Court is willing to entertain such a motion.

Although ordinarily a petitioner would face problems regarding the rules concerning successive petitions when attempting to file a Rule 60(b) motion, under these unprecedented circumstances, a Rule 60(b) motion is proper. As discussed above, the District Court was clearly operating under a misunderstanding of the law when it dismissed the petition believing it could entertain the competency claim without a successor bar.

Relief under Rule 60(b)(6) is available just for such extraordinary circumstances as these. Rule 60(b)(6) "reflects and confirms the courts' own inherent and discretionary power 'firmly established in English practice long before foundation of our Republic.' to set aside a judgment whose enforcement would work inequity." *Plaut v. Spendthrift Farm, Inc.*, 115 S.Ct. 1447, 1460 (1995), citing *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244 (1944). There is no question but that these facts work an extreme inequity.

Rule 60(b)(3) relief which allows relief based on fraud, misrepresentation or other misconduct of an adverse party, is also warranted under these facts based on Respondents' actions. As discussed above, Respondents first persuaded the District Court that it could hear this claim under the very circumstances present here. Relying on that position, the District Court dismissed the claim "without prejudice" because it was premature. Respondents then requested, and obtained, a warrant for

Petitioner's execution. Petitioner moved the District Court to amend its order dismissing the petition and hold this claim in abeyance. Petitioner specifically referred the District Court to the passage of the AEDPA and its potential consequences. Respondents remained mute during these proceedings. The District Court issued an order denying Petitioner's request but stating that it intended to hear the claim, and it would not be treated as a successive claim. Respondents remained mute. It was only two days ago as Petitioner sought services to bring this supplemented claim fully and fairly before the District Court, that Respondents spoke up, and asserted an entirely new position: they now contended the competency claim was barred, and the District Court could not hear it, and, indeed, no federal court could hear it.

On these facts, Respondents misrepresented the consequences stemming from the District Court's actions not only to Petitioner, but to the District Court as well. Not once did Respondents tell the District Court that it was entirely wrong, as a matter of law, in its belief that it could hear this claim.

Respondents should also be judicially estopped from taking this entirely inconsistent position. As this Court has explained,

> the doctrine of judicial estoppel, sometimes referred to as the doctrine of preclusion of inconsistent positions, is invoked to prevent a party from changing its position over the course of judicial proceedings when such positional changes have an adverse impact on the judicial process.

Russell v. Rolfs, 893 F.2d at 1037. The doctrine is "intended to protect the integrity of the judicial process by preventing a litigant from 'playing fast and loose' with the courts." *Helfand v. Gerson*, 105 F.3d 530, 533 (9th Cir. 1997) (quoting *Russell v. Rolfs*, 893 F.2d at 1037). In *Russell*, judicial estoppel was applied to prevent the state from taking a directly contrary position under circumstances strikingly similar to those presented here. There, the state "persuaded the district court to deny [the habeas corpus petitioner] federal review on the ground that he had an 'adequate and available' state remedy" to exhaust his claim. *Id.*, at 1038. However, once the petitioner returned to state court, the state "disregarded its previous representation in federal court and argued the petition was procedurally barred because [the petitioner] had raised the same issues on direct appeal." The state court ultimately agreed, and found the claim procedurally defaulted. However, when the petitioner returned to federal court, the state argued that the petitioner "was procedurally barred from presenting his claim in federal court." *Id.* at 1037. The appellate court held that the state's earlier action estopped it from taking this entirely different position. *See Yniguez v. State of Arizona*, 939 F.2d 727 (1991) (Attorney General judicially estopped from "about-face" where he sought "an outcome [in the appellate court that was] directly contrary to the result he sought and obtained in the district court").

In another analogous situation, although the inequities presented here are far greater, the Seventh Circuit, which applies the AEDPA retroactively to pending cases, concluded that the AEDPA could not be applied to a

second petition challenging the constitutionality of a petitioner's death sentence for the first time. *Burris v. Parke*, 95 F.3d at 469. The en banc court reached this ruling based on the fact that at the time the first habeas petition was filed, all the parties, including the state, believed the petitioner could later file a second petition challenging his sentencing issues after exhausting his state court remedies. The en banc court noted that the hearing transcript on the first petition gave "no hint" that proceeding this way "might have precluded [Burris from] filing a second petition limited to the sentence, and in fact the "silences are deafening." Under these circumstances, the court concluded that:

> the state's silence concerning the implications of an immediate decision on the petition was tantamount to a statement that for the sake of a prompt decision on the merits of Burris's challenge to his conviction the state would forgo the defense of abuse of the writ should he file a subsequent petition limited to the sentence.

Id., at 470. As a result, the "state forfeited any defense" preventing the claims to be heard on the merits in the second petition because applying the AEDPA "would have the effect of mousetrapping [the petitioner]. It would cause him to forfeit a legal remedy on which his life may, literally, depend."

The en banc court also found it "of no moment" that the petitioner had filed a second petition before the AEDPA went into effect. The only thing that was important was that application of the AEDPA would "attach a new, unforeseeable, and adverse legal consequence to the first petition." *Id.*

Here, of course, Petitioner has not filed a second petition. This is his first petition. Petitioner should at the very least be given the same relief as that given in *Burris*, particularly given that Respondents were not just silent; they actively advocated to both the Court and Petitioner that this claim should not be heard earlier. Petitioner then did just what Respondents, and the District Court, told him to do: he reasserted this claim after a warrant of execution issued. Yet now he is faced with no remedy at all. Respondents must be estopped from obtaining this result.

III. Petitioner Should Be Granted Leave To File A Successive Petition.

Alternatively, because of the unprecedented circumstances here, Petitioner requests leave to file a new petition in the District Court, pursuant to 28 U.S.C. § 2244, before it was amended by the AEDPA. This result is consistent with that reached in *Burris v. Park* where similar, although not nearly as harsh, circumstances were present. If Petitioner were not allowed to file a successive petition, and Respondents' argument allowed to prevail, then the AEDPA effectively deprives all federal district courts of jurisdiction to enforce the Eighth Amendment prohibition on the execution of the insane. Nothing in the legislative history or text of the statute indicates an intent to divest the federal courts of jurisdiction to enforce any right recognized under the federal constitution.

The constitutional nature of the right in issue in this case is not open to question. The Supreme Court has definitively ruled that the Eighth Amendment "prohibits

a state from carrying out a sentence of death upon a prisoner who is insane." *Ford v. Wainwright*, 477 U.S. at 409-410. Since *Marbury v. Madison*, 1 Cranch 37, 2 L.Ed. 60 (1803), the power and duty of the federal courts to enforce the constitution has been beyond dispute. Though some restrictions were placed upon the writ of habeas corpus in the recent legislation, Congress continued to respect the role of federal courts to interpret the Constitution:

> In the great 1803 case of Marbury v. Madison, Chief Justice John Marshall explained for the Supreme Court that "it is emphatically the province and duty of the judicial department to say what the law is." Section 104(3) would be subject to serious constitutional challenge if it were read to preclude the Federal Courts from making an independent determination of "what the law is" in cases within their jurisdiction. I expect that the courts, following their usual practice of construing ambiguous statutes to avoid constitutional problems, will read section 104 to permit independent Federal Court review of constitutional claims based on the Supreme Court's interpretation of the Constitution and Federal Laws.

Statement by President William Jefferson Clinton upon signing S. 1965, April 24, 1996, 1996 WL 517206.

Respondents seek to limit the power of the federal courts by procedural artifice – first by defending the issue in prior proceedings on the ground that it should be raised now, and now claiming that it should have been ruled upon then. This Court should do as the Seventh Circuit did: flatly reject such an argument. *Burris v. Parks*,

95 F.3d at 469. To do otherwise here raises a novel and serious constitutional question: whether it would violate the Suspension Clause of Article 1, Section 9 to deprive Petitioner completely of the right to be protected from execution while he is incompetent – even though he raised this claim in his petition four yeas ago and it was dismissed without prejudice as premature. Under these facts, "the Privilege of the Writ of Habeas Corpus" with regard to his fundamental constitutional right not to be executed while insane, would be "suspended" completely. An application of the AEDPA which so abruptly and drastically eliminates an existing vested right to apply for relief raises serious questions under the Suspension Clause. *Cf. Breard v. Angelone,* 926 F.Supp. 546, 5474 (E.D.Va. 1996) (interpreting limitations period of 28 U.S.C. § 2263 to commence on date of AEDPA's passage where, to do otherwise would have immediately time barred petitioner's claim, to avoid violation of the Suspension Clause).

In the extraordinary circumstances of this case, if the Court can find no other means by which to fulfill the promise that Petitioner would be allowed to litigate his 'present competence' claim at a later date, the Court should grant relief similar to that allowed by the Seventh Circuit in *Burris:* leave to file a successive petition unimpeded by the newly created restrictions of the AEDPA. If no other remedy exists, only by such an order can this case be resolved in a manner consistent with the constitutional guarantees surrounding the writ of habeas corpus, and the due process of law to which Petitioner is entitled under the Fifth and Fourteenth Amendments.

IV. This Court Should Recall Its Mandate To Hear This Claim.

This Court has the power to recall a mandate because of "an overpowering sense of fairness and a firm belief that this is the exceptional case requiring recall of the mandate in order to prevent an injustice." *Ziptel v. Halliburton Company,* 861 F.2d 565, 567-68 (9th Cir. 1988). Exceptional circumstances require recalling the mandate when necessary "to protect the integrity of [the court's] own processes." *Bryant v. Ford Motor Co.,* 886 F.2d 1526, 1529 (9th Cir. 1989). An "abrupt change in the law" also justifies a recall of the mandate. *Id.* at 1530. This Court found such a reason in *Bryant* where congressional action was taken while the appellee's petition for certiorari was pending in that case which "conceivably deprived [appellee] of its day in court before the Supreme Court." *Id.*

Here, too, an abrupt change in the law in the middle of these proceedings requires this Court to take extraordinary action to prevent a manifest injustice. At the time the District Court originally reserved decision on the present competency issue, and this Court affirmed that reservation, it believed, as did Petitioner and the Respondents, that this claim could be heard when a warrant for execution issued. As a result of this belief, there was no federal determination of Petitioner's competency. In the interim, however, the AEDPA was enacted which bars federal review of any claims raised in successive habeas petitions concerning the legality of a sentence. Moreover, completely contrary to their earlier position, Respondents have just for the first time contended that this claim cannot be heard, but is barred under the recently enacted

AEDPA provisions. Because Petitioner relied to his detriment on express and repeated assurances that his competency to be executed would be reviewed, and no procedural bar to that review would be raised, "good cause" exists to recali the mandate of the prior judgment to prevent this injustice. *See Aerojet-General Corp. v. American Arbitration Association*, 478 F.2d 248, 254 (9th Cir. 1973).

V. A Stay Of Execution Is Necessary and Warranted.

Petitioner moves this Court to stay his execution to properly and thoroughly consider and resolve a number of serious issues arising out of the Catch 22 Respondents, and, albeit unwittingly, the District Court, created when it dismissed this petition. A gross miscarriage of justice will occur if a stay does not issue in light of these extraordinary circumstances that bring this case to this Court at this time. All of these questions raised here present novel and important constitutional question warranting this Court's full review. This review, however, cannot take place in the short time remaining before Petitioner's execution. For all these reasons, Petitioner asks this Court to immediately issue a stay of his execution.

Dated this 16th day of May, 1997.

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 97-80229
(Former Nos. 94-99011, 94-99012)

RAMON MARTINEZ-VILLAREAL, PETITIONER-APPELLANT, -vs- TERRY L. STEWART, et al., RESPONDENTS-APPELLEES.	)	UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, No. CIV-86-296 TUC RMB

OPPOSITION TO MOTION FOR MISCELLANEOUS RELIEF
(Certificate of Probable Cause; Remand to File Rule 60(b) Motion; Leave to File Successor Petition; Recall of Mandate; Stay of Execution)

CAPITAL CASE: EXECUTION SHEDULED [sic] FOR MAY 21, 1997

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 97-99009
(Former Nos. 94-99011, 94-0012)

RAMON MARTINEZ-VILLAREAL, PETITIONER-APPELLANT, -vs- TERRY L. STEWART, et al., RESPONDENTS-APPELLEES.	)	UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, No. CIV-86-296 TUC RMB CAPITAL CASE: EXECUTION SCHEDULED FOR MAY 21, 1997

Respondents oppose all relief requested by Petitioner, for the reasons set out in the attached Memorandum of Points and Authorities.

DATED this 19th day of May, 1997.

Respectfully submitted,

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/s/ BRUCE M. FERG
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RESPONDENTS-APPELLEES

MEMORANDUM OF POINTS AND AUTHORITIES

A. Procedural History.

Petitioner was convicted of two counts of murder and sentenced to death. *State v. Martinez-Villareal*, 145 Ariz. 411, 702 P.2d 670, *cert. denied*, 474 U.S. 975 (1985). After three state post-conviction ("Rule 32") proceedings, he filed a federal habeas corpus petition. The District Court granted the petition in part, ordering that he be resentenced, on the ground that trial counsel had been ineffective in the penalty phase of the trial. However, this Court reversed that grant of relief because the ineffective assistance claim was procedurally barred, and found no other grounds on which to grant relief. *Martinez-Villareal v. Lewis*, 80 F.3d 1301 (9th Cir.), *cert. denied*, 117 S. Ct. 588 (1996). In the District Court Petitioner had asserted that he was incompetent to be executed, but "Because the trial court held that under Arizona law a Rule 32 petition is not the correct procedure for pursuing such a claim, the district court properly found this claim to be premature." (*Id.* at 1307.) This Court noted that its ultimate "instruction to enter judgment denying the petition is not intended to affect any later litigation of that [current incompetency] question." (*Id.* at 1309 n.1.)

In accordance with this Court's directions, the District Court entered judgment, denying the competency for execution claim without prejudice and the rest of the petition with prejudice. (CR 152-53, Order and Judgment of Feb. 28, 1997.)[1] Petitioner's counsel, Sean Bruner, filed a motion for reconsideration under Rule 59 of the Federal Rules of Civil Procedure, requesting that the competency for execution claim be held in abeyance, rather than dismissed, in order to avoid application of the limitation on successive petitions enacted by the 1996 Antiterrorism and Effective Death Penalty Act. (CR 154.) The District Court denied that motion, because in its view there was no need to grant the requested relief:

> That particular claim could not even be construed as an unexhausted claim since it was not ripe when it was presented. For this reason, the Court dismissed it without prejudice. Therefore, the Court has no intention of treating the "incompetency to be executed" claim as a successive petition.

(CR 155.) Petitioner filed a notice of appeal from the denial of the Rule 59 motion. (CR 159.) The District Court refused to issue a certificate of appealability, stating:

> Petitioner is attempting to have this Court issue a stay where there are no outstanding matters pending. Petitioner must exhaust his state claim on the status of his present mental competency. Moreover, Petitioner provided no authority [for]

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[1] Unless otherwise indicated, all documents referred to herein are already available to the Court, in the record related to Petitioner's appeal, transmitted to this Court on 5/8/97, or previously lodged with this Court by Respondents.

> his request for stay of the Petition. The Court concludes that this appeal is legally deficient and procedurally improper.

(CR 162.) On May 16, 1997, this Court agreed with that decision, itself denying a COA on the Rule 59 appeal.

In March of 1997 Petitioner also filed motions with the District Court seeking the appointment of another individual attorney, Sean O'Brien, and the Federal Public Defender's Office, to assist Bruner in the federal habeas proceeding. (CR 156, 160.) The District Court denied both motions, noting that it lacked jurisdiction to make the appointments, because the case had been "termed" by its actions of February 28, 1997. (CR 161.)

In February of 1997 Mr. Bruner filed an appropriate motion in the Arizona Superior Court, requesting an evaluation of Petitioner's competency to be executed, in accordance with A.R.S. § 13-4022. As preparations for a hearing on that issue were being made, the Arizona Supreme Court issued a warrant, setting Petitioner's execution date for April 16, 1997. The Superior Court commenced the evidentiary hearing on April 7, 1997 but did not complete it at that time. Mr. Bruner had taken a special action to the Arizona Supreme Court, complaining that he had inadequate time to prepare, so the Arizona Supreme Court stayed the execution, resetting it for May 21, 1997. Additional evidence was taken by the Superior Court on May 6-8, 1997. It issued its ruling on May 9, 1997, finding Petitioner competent to be executed, because he "is aware that he is to be punished for the crime of murder and . . . he is aware that the impending punishment for that crime is death." As permitted by the

statute, Petitioner then filed a special action to the Arizona Supreme Court, seeking review of that determination and legal issues related to it, which Respondents have answered. The Arizona Supreme Court concluded its review late on Friday, May 16, stating: "[H]aving independently reviewed the testimony and medical evidence introduced at the hearing, and in light of the findings of the trial court, this court concludes that the trial judge correctly found that Petitioner failed to prove incompetency by clear and convincing evidence or even by the lesser standard requiring proof by a preponderance of the evidence."

On May 13, 1997, the Arizona Federal Public Defender Office filed a motion in the District Court, requesting that they and Sean O'Brien be appointed to represent Petitioner, on the theory that original counsel Sean Bruner might need "to be called as a witness at a competency hearing in this [District] Court." (Page 8.) They further requested authorization to expend funds for MRI and special EEG testing of Petitioner, as well as to retain additional mental health experts to evaluate Petitioner, because those requests had been denied in the Superior Court proceeding. (*Id.* at 3-9.) Without waiting for a response from Respondents, the District Court issued an order on May 14, 1997, granting the appointment of the FPD and O'Brien as counsel, and setting a telephonic hearing on the remainder of the requests for the afternoon of May 15. On the morning of May 15, Respondents filed a detailed opposition to the motion, pointing out the successive nature of the petition being contemplated, the lack of permission for filing from this Court, and other reasons why the District Court lacked

jurisdiction to take any action in the case. A telephonic hearing was held on the afternoon of May 15, and on May 16 the District Court issued two orders, concluding that it lacks jurisdiction, but granting a certificate of appeal.

B. Factual Representations In Petitioner's Motion.

A number of statements made in the Motion may be seriously misleading to the Court, and so will be addressed immediately.

1. The Motion at 2 characterizes this Court's action in the original appeal as "reserv[ing] judgment" on the competency for execution issue, as if this Court contemplated some kind of continuing jurisdiction over that claim. However, the very footnote from the opinion which it cites plainly (and correctly) states that that claim had been denied by the District Court as premature and, "That decision was not contested on appeal." 80 F.2d at 1309 n.1. Not having been contested on appeal, the ruling on the competency issue was not before the Court, so there was neither the jurisdiction nor the intention on the part of this Court to have any continuing oversight concerning it.

2. Throughout the Motion counsel for Respondents is characterized as deceptive, playing fast and loose with the courts, and the like, largely because no response was filed to the Rule 59 motion. Petitioner conveniently ignores Arizona District Court Rule 1.10(p): "No response to a motion for reconsideration or clarification shall be filed unless ordered by the Court. If the Court is inclined to grant a motion for reconsideration, or otherwise desires a response before ruling, it shall order opposing

counsel to respond." The District Court ruled on the Rule 59 motion without ordering any response from Respondents; counsel for Respondents cannot reasonably be faulted for "remaining mute" and not filing something when the rule specifically forbade him to do so.

Moreover, it must be recognized that the only authority directly addressing whether a competency for execution claim will be deemed successive under the amended habeas corpus statutes is *In re Medina*, 109 F.3d 1556 (11th Cir.), *cert. denied*, 117 S. Ct. 1330, 1331 (1997). That decision was published on March 24, 1997 – the very day the District Court ruled on the Rule 59 motion. Counsel for Respondents did not, to the best of his recollection, become aware of *In re Medina* until weeks later, after Petitioner's notice of appeal had been filed on April 17, and while he was focused on preparations for the continued evidentiary hearing to be held in the Superior Court. The District Court lost jurisdiction of the Rule 59 matter as soon as the notice of appeal was filed. *Carriger v. Lewis*, 971 F.2d 329, 332 (9th Cir. 1992). Thus, there was neither opportunity nor reason to point out *In re Medina* to the District Court until the Federal Public Defenders filed their May 13 motions.

The second major basis for calling Respondents' counsel names is that he suggested to the District Court that the "competency for execution" claim was unripe for federal adjudication in 1994. How it could have been more accurately described is a puzzlement: at the time it had not been properly presented to the state courts (see this Court's previous opinion, 80 F.3d at 1307); no warrant had then been issued, and none would be issued under the Arizona Supreme Court's practice until the

federal habeas proceeding was complete; and the issue was a person's mental condition, which could well fluctuate significantly over the years that would certainly intervene before Petitioner's execution became truly imminent.

In fact it is now almost 3 years since the June, 1994, hearing held by the District Court. The Motion itself (at 6) quotes Respondents' counsel's argument in his Reply on Motion for Summary Judgment: "To do a competency determination now [December 1993] would be futile, because it will certainly have to be repeated when the time for execution [now set for May 1997] finally arrives." And that is precisely what has transpired. Suppose that the competency claim actually had been litigated in 1994; the determination made then would have been so stale by this time that a new hearing would have to be held – just as has been done. Thus, it is plain that, regardless of what the parties or the District Court believed or did in 1993-94, nothing would be different: Petitioner would still have to litigate the competency claim *now*, irrespective of whether he had done so then, and at this time it inevitably is successive. In shore, it is the nature of the claim, not the arguments made by Respondents, which places Petitioner in the position he now occupies.

3. Page 3 of the Motion misleadingly states that, "After denying Petitioner's requests for expert assistance and testing, the state court ruled that Petitioner was competent," as if Petitioner had been precluded from presenting any expert evidence at all. The only "expert assistance" denied was an evaluation by a retardation specialist, Dr. Denis Keyes, who unexplainedly was not

requested until just one week before the continued evidentiary hearing was to resume. As the hearing transcripts previously lodged with this Court demonstrate, Petitioner presented live testimony of Dr. Leonardo Garcia-Bunuel (Spanish-speaking psychiatrist), Dr. Bertha Imaz (psychiatrist from Mexico), and Dr. Joseph Geffen (Spanish-speaking psychologist), as well as a videotaped deposition by a well known neurologist, Dr. Jonathan Pincus, all of whom submitted written reports and willingly testified that Petitioner is retarded or brain-damaged. Hence, the trial court was thoroughly justified in concluding that testimony from Keyes would not be particularly helpful to its decision-making.

The tests requested were of two types. The first sort is magnetic resonance imaging (MRI) of Petitioner's brain. However, a report by Petitioner's own witness, Dr. Geffen, conceded that, "Although an MRI test could be useful, the results would mostly shed light with respect to 'structural' abnormalities of the brain as opposed to functional ones." (Report of 4/2/97 at 5.) This amounts to a concession that the MRI testing would not produce any relevant information, because the point of concern is not abstract information about the structural abnormalities of Petitioner's brain, but only the single narrow issue of whether he understands that he is to be executed because he has been convicted of murder. If anything, that is a "functional" issue, which Geffen said the MRI would not address. Thus, the delay (likely the real object of the motion), transportation difficulties, etc., involved in arranging for such testing of Petitioner would have been utterly pointless.

The situation is similar with regard to the other sort of testing suggested, the "neurometric EEG," which Geffen's same report at 5 indicates is also known as "computereized EEG" or "brain mapping." The Arizona Court of Appeals upheld exclusion of "brain electrical activity mapping (BEAM)" evidence in a first degree murder case, where the system was described as "a computerized method of displaying and interpreting EEG . . . data," because "there was substantial evidence from which the court could conclude that BEAM is not generally accepted in the neurological community." *State v. Zimmerman*, 166 Ariz. 325, 327-29, 802 P.2d 1024, 1026-28 (Ct. App. 1990). As a merely experimental procedure, it was not something the court needed to receive as evidence. (*Id.*) The same result was reached in the only other case concerning brain mapping discovered by counsel for Respondents, *Head v. Lithonia Corp., Inc.*, 881 F.2d 941 (10th Cir. 1989). Thus, Petitioner was seeking what amounted to a stay of his execution to allow for testing of a sort not even accepted within the relevant medical circles.[2]

4. The Motion at 3 mischaracterizes the Superior Court's ruling, when it says that the court did not resolve the disputed facts. The full text of the ruling (Minute Entry of 5/9/97) has been submitted to the Court. While it does not take the time to analyze the details of the conflicting statements made by the various experts in the manner that an advocate might, it plainly did resolve the

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[2] The Court should also be aware that the records submitted to the Superior Court showed that a regular EEG was conducted of Petitioner in 1993, and found to be normal.

sole factual issue before it, specifically concluding that, "Defendant is aware that he is to be punished for the crime of murder and that he is aware that the impending punishment for that crime is death." Therefore, whenever the Court encounters a statement like that on pp. 4-5, that Petitioner "is unaware of his pending execution and the reasons for it," it should recognize that Petitioner is merely disagreeing with a well-grounded factual determination made by the state court – the kind of factual determination to which all federal courts are bound to defer, even by non-AEDPA habeas jurisprudence.

It should also be noted that the Motion at 10 misleadingly says that the Superior Court concluded Petitioner "had failed to prove that he was not competent to be executed *and thus* he was unaware that he is to be punished for the crime of murder and that the punishment for that crime is death." (Emphasis added.) "Thus" as used here signifies a result of consequence (see WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1986) at 2388), so that the Motion paints Judge Johnson as concluding that Petitioner is aware that he is to be punished for murder by the death penalty *because* Petitioner failed to carry the burden of proving that he is incompetent. In fact, the findings regarding Petitioner's failure to satisfy his burden of proving incompetence and specifically concluding that Petitioner does know that he is to be punished for murder by the death penalty are in separate, individually numbered paragraphs of the order. It therefore is plain that Judge Johnson found, not only that Petitioner had not satisfied his burden of proving incompetence, but also that the evidence presented affirmatively demonstrated Petitioner's full awareness of his situation.

5. The Motion endlessly repeats statements to the effect that *all* federal jurisdiction over Petitioner's claim is being lost. Not true; as page 3 of the District Court's order (attached to the Motion) itself points out, it is only *district court* review which is being precluded by application of the habeas amendments, so that Petitioner still can seek federal review by petition for certiorari or original habeas petition to the Supreme Court.

6. The District Court delivered itself of *dicta*, expressing its opinion that Petitioner is not malingering, but suffers from such mental problems that he is not competent. (Motion at 11-12.) However, this Court must recognize that that opinion is utterly lacking in a current factual basis, merely harking back to what the District Court *thought* it saw during its hearing in 1994. The record of the current, 4-day Superior Court hearing was not before the District Court (who currently is trying a case in Texas and conducted the May 15 hearing telephonically). Had Judge Bilby read the current record he would have learned that the parties stipulated to avowals of what testimony would have been given by a number of correctional officers in daily contact with Petitioner in the prison. Those uncontroverted avowals showed that Petitioner had conspicuously changed his behavior, in a manner indicating malingering, by going from a routinely well-groomed and hygienic inmate, to a state of exaggerated neglect (such as his hair sticking up and out, in what was variously described as the "Don King mode" or "like a person would have stuck his finger in a light socket"), just in time for the 1994 District Court hearing regarding his mental condition – and then went back to proper personal upkeep after the hearing concluded. (R.T.

of May 8, 1997, at 164-65, 168.)[3] Although the Motion cannot put in issue the state court competency hearing, this Court must not be influenced by the District Court's out-of-date and clearly inaccurate *dicta* in resolving the issues which are before it.

With a correct understanding of the facts, the Court may now turn to those issues.

C. Reasons To Deny All Requested Relief.

I

NO CERTIFICATE OF APPEALABILITY OR PROBABLE CAUSE REGARDING THE APPEAL OF THE RULE 59 MOTION SHOULD BE GRANTED.

Petitioner begins by requesting that a certificate of probable cause (a requirement for the hearing of an

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[3] Similarly, Dr. Bradley Johnson, Petitioner's prison psychiatrist in 1995-96, personally observed Petitioner change instantly from an entirely ordinary "affect," laughing and responding to the TV show he was watching, to a depressed, nonresponsive condition (which is fundamental to the negative diagnoses made of Petitioner by many persons having only brief contact with him) – when Petitioner realized that the doctor was observing him. (R.T. of May 7, 1997, at 207-09.) Although Petitioner claims to experience hallucinations, he does not react to them as people actually hallucinating do. He does not become distracted by or talk back to the "voices." (*Id.* at 204-05, 219-20.) When pressured to describe the bird he supposedly sees, Petitioner could not do so, claiming that he could not see it well because of his poor eyesight! (*Id.* at 205.) Since hallucinations have nothing to do with ordinary sight (even the blind being capable of hallucinating), this casts grave doubt on the veracity of his reported visions. (*Id.* at 205-06.)

appeal under pre-AEDPA law) be issued, permitting appeal of the denial of his Rule 59 motion. (Motion at 12-14.) The District Court applied the AEDPA, and denied the certificate of appealability required by the amended statute. Here events have overtaken Petitioner's pleading, the Court having ruled on May 16 that it will not grant a COA either. Thus, this request for relief would seem to have been effectively resolved against Petitioner by the Court's May 16 order.

Petitioner undoubtedly would disagree, since he contends that this should be treated as a pre-AEDPA case, to which the arguably lower CPC standard should be applied. Respondents believe that the Act does apply to this case. Neither of the cases on which Petitioner relies, *Jeffries v. Wood*, 103 F.3d 827 (9th Cir. 1996), and *Naddi v. Hill*, 106 F.3d 275 (9th Cir. 1997), dealt with a procedural picture comparable to the one in this case. This Court specifically stated in *Greenawalt v. Stewart*, 105 F.3d 1268, 1273 (9th Cir. 1997) – which, despite showing up in an earlier reporter than *Naddi*, was decided after it – "We have not decided whether the amendments to section 2253 requiring a certificate of appealability apply to cases in which no CPC had been issued as of the effective date." There was, of course, no CPC which had issued with respect to the new and separately appealable Rule 59 issue. To permit the CPC from Petitioner's original appeal to make this a pre-AEDPA case defies logic in two ways: first, the competency claim was not even at issue in the original appeal (80 F.3d at 1309 n.1); second, to allow the original CPC to cover a wholly separate, post-appeal motion like this one (implicitly allowing a petitioner to spin out a whole series of legally and logically distinct

appeals based on the issuance of a CPC at some point in the distant past) seems to be the sort of evasion of the requirements of the AEDPA which *Greenawalt* says is not permissible. 105 F.3d at 1275.

However, it is not necessary to resolve this issue, because just as in *Greenawalt* (*id.* at 1273), Petitioner loses even if the lesser CPC standard is applied to him. As this Court pointed out in its May 16 decision (at 2-3), the District Court's denial of the Rule 59 motion was certainly not an abuse of its discretion; indeed, the Rule 59 motion's plea to hold the case in abeyance, to avoid application of the AEDPA, is precisely the argument rejected by *Greenawalt*. 105 F.3d at 1273-75. Since the District Court's ruling was clearly correct, Petitioner cannot show an entitlement to any sort of certificate.

And this is so, even if the District Court's ruling was based on a mistaken belief that a subsequent petition concerning the competency claim would not have to be treated as successive, because the ultimate ruling was correct and Petitioner was not prejudiced. *Greenawalt*, 105 F.3d at 1275-76. The claimed prejudice is a lack of district court review of the competency for execution claim. However, even the District Court recognized that, even under the AEDPA, Petitioner still has a right to federal review, by means of certiorari petition or original habeas application to the Supreme Court. While such review is rather limited, it is not meaningfully different from what Petitioner could have obtained in the District Court, which would not have been free to conduct its own hearing and reach its own conclusions regarding Petitioner's competency, but rather, would have been

required to defer to the well-grounded factual determination made by the Arizona courts that Petitioner understands his situation.

The United States Supreme Court has repeatedly held that other sorts of competency determinations are factual matters, based largely on assessment of demeanor and credibility, so that the trial judge's conclusions must be accepted if supported by the record. *See Demosthenes v. Baal*, 495 U.S. 731, 735, 110 S. Ct. 2223, 2225, 109 L. Ed. 2d 762 (1990); *Miller v. Fenton*, 474 U.S. 104, 112-17, 106 S. Ct. 445, 451-53, 88 L. Ed. 2d 405 (1985); *Maggio v. Fulford*, 462 U.S. 111, 116-18, 103 S. Ct. 2261, 2263-64, 76 L. Ed. 2d 794 (1983). Although not specifically stating it in those terms, it is evident that all of the opinions in the seminal case on the constitutional requirement of competency for execution, *Ford v. Wainwright*, 477 U.S. 399, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986), contemplated that this same standard of review would apply to determinations of competency for execution, as demonstrated by the lengthy discussions of whether Florida's procedures would entitle the competency finding made there to the deferential treatment normally accorded to state court findings of fact.

Federal cases applying *Ford* have treated state court determinations of competency for execution as issues of fact, to be deferred to if supported by the evidence. *See, e.g., Weeks v. Jones*, 52 F.3d 1559, 1562 (11th Cir.), *cert. denied*, 115 S. Ct. 1841 (1995) ("Based on its findings at the evidentiary hearing, the state court made a factual determination that Weeks was competent."); *Shaw v. Armontrout*, 900 F.2d 123, 126 (8th Cir. 1990) (review of record showed fair support for state court's findings and,

since habeas court must defer to state court factual determinations, "the state court's decision that Shaw 'understand[s] the nature and purpose of the punishment about to be imposed upon him' and is competent to be executed disposes of Shaw's eighth amendment claim."); *Graham v. Lynaugh*, 854 F.2d 715, 720-21 (5th Cir. 1988) ("the state court's findings must be given a presumption of correctness unless one of the conditions provided in section 2254(d) is established," and the trial court's factual finding of competency for execution was fairly supported by the record, despite conflicting opinions by various experts). Although this Court apparently has never had occasion to address competency for execution before, it did recognize competency to stand trial and waive counsel (which plainly demand far more of the person involved than competency for execution) as factual matters, concerning which state court findings supported by the record must be deferred to, in *Evans v. Raines*, 800 F.2d 884, 887 (9th Cir. 1986). In short, Petitioner would not receive anything from the District Court review he claims to have lost that is essentially different from the sorts of federal review still clearly open to him, so he has suffered no cognizable prejudice.

Here and throughout the Motion Petitioner invokes the judicial estoppel rule of *Russell v. Rolfs*, 893 F.2d 1033 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 2915 (1991), to argue that Respondents should be precluded from raising any "procedural objection to the federal review of Petitioner's competency claim." Petitioner's reliance on *Russell* is clearly misplaced. There the representatives of the state affirmatively and explicitly contended that habeas review of Russell's claims was improper because he still had an

"adequate and available" state remedy for those claims, but reversed position when the case was sent back to the state courts and claimed that no relief was available. (*Id.* at 1037-38.) No such representations or reversal of course occurred in this case. Respondents contended in 1993-94 that the proper vehicle for Petitioner to litigate his competency for execution claim was a proceeding under the statute specifically designed for just such claims (not a Rule 32 proceeding), and that is what Petitioner has received; when he filed properly under A.R.S. § 13-4022, he got his hearing. Respondents contended in 1993-94 that the issue of competency for execution should not be determined in that habeas proceeding because it was not ripe to be heard, and the chronology of the case has borne out that position; as anticipated, it took years to resolve the rest of the issues and get Petitioner to a position where execution is imminent, so a competency determination made in 1994 would have been a futile act.

The crux of Petitioner's complaint really is nothing deceptive done by Respondents but rather the restriction on successive petitions enacted by the AEDPA, and that is not grounds for criticizing Respondents' conduct or for granting Petitioner any relief:

> [W]e require state prisoners to exhaust their claims in state court before coming to federal court with a habeas corpus petition. We adhere to that requirement even though Congress and the Supreme Court periodically modify the rules governing the availability of habeas corpus relief in federal court. We acknowledge that the Act may have worsened Greenawalt's legal position while he was exhausting his state remedies; undoubtedly, there are many state prisoners in the same situation. But Congress intended to restrict the availability of habeas corpus relief when it passed the Act, and the Supreme Court has held that the Act is constitutional. *Felker v. Turpin*, ___ U.S. ___, 116 S. Ct. 2333, 135 L. Ed. 2d 827 (1996). The district court correctly refused to help Greenawalt evade its requirements by accepting a federal petition which was plainly and concededly premature.

105 F.3d at 1275. By the same token, Petitioner's competency claim was "plainly and concededly premature" at all times before now, so it was properly not resolved in 1994, and the District Court here "correctly refused to help [Martinez-Villareal] evade [the AEDPA] requirements" by holding the competency claim in abeyance while it was still being exhausted in the state courts.

Petitioner's related ploy of involving *Burris v. Parke*, 95 F.3d 465 (7th Cir. 1996), is equally unavailing. In *Burris* the petitioner was litigating a petition which included only guilt-phase claims because he has been resentenced and the appeal of the resentencing was still pending in the Indiana Supreme Court, but the state's representative affirmatively told the habeas court to rule right away, even though the petition plainly was premature because the sentencing part of the case was not yet exhausted. "The state did not refer to the petition's prematurity at the hearing . . . " (*Id.* at 471, Judge Manion concurring.) When Burris returned with his sentencing claims and the state argued that it was a successive petition Burris was deemed to have detrimentally relied on the state's previous silence. That, of course, is just the opposite of what occurred here, where Respondents *did* raise the prematurity of the competency for execution claim. Here

Petitioner's complaint seems to be that Respondents didn't say enough, in not warning that adverse consequences might follow from litigating that claim in a second petition. However, if the claim was not resolved in the first petition, *any* federal review of it would obviously come in a *second* or later (*i.e.*, successive) petition, so the simple facts of the situation were sufficient to put Petitioner and his counsel on notice that there might well be problems with the issue when it did become ripe for determination. That *Burris* is not to be read as Petitioner seems to wish, that the state is liable to waive its procedural defenses to successive petitions if it does not tutor the petitioner in the possible implications of his litigation decisions, is explicitly debunked by the *Burris* concurrence. (*Id.* at 470-72.) Thus, *Burris* has little utility beyond its own unique facts.

Moreover, that *Burris* does not control here is demonstrated by *In re Medina*. There the petitioner also invoked *Burris*, arguing that he should be able to present a competency for execution claim in a successive petition, which he had intentionally not raised in his first petition because the law of competency under *Ford v. Wainwright* "binds the issue temporally to a particular set of facts that did not obtain" at the time of his first petition. 109 F.3d at 1562. Thus, Medina's failure to litigate the competency claim in his first petition was the result of the defense's (correct) understanding of the law, just as the failure to litigate it in this case was the result of the defense's (and District Court's) correct understanding that Petitioner's claim was premature when raised in 1993-94. The Eleventh Circuit concluded that that was not the sort of "detrimental reliance" which had occurred in *Burris*.

Since this case is not meaningfully distinguishable from *Medina*, this Court should likewise conclude that there has been no cognizable "detrimental reliance" by Petitioner.

In the vague concluding paragraph of this argument (Motion at 14) Petitioner attempts to dragoon Respondents into some sort of support for his position; Respondents decline the invitation. Nothing argued supports the claim that any kind of a certificate should be issued concerning the denial of the Rule 59 motion.

II

PETITIONER SHOULD NOT BE GRANTED LEAVE TO FILE A RULE 60(B) MOTION.

Although reframed in terms of a request for permission to file a Rule 60(b) motion, the next section of this Motion (pp. 14-19) is essentially a reprise of the arguments from the first section which are refuted above. Therefore, they will not be responded to at length. However, several observations are in order.

Petitioner relies upon *Carriger v. Lewis* for the proposition that this Court should grant him permission to go back to the District Court and file a Rule 60(b) motion. (Motion at 14.) However, even while he invokes *Carriger* he has failed to follow it. *Carriger* points out that the filing of a notice of appeal divests a district court of jurisdiction, so it lays out the procedure to follow when a case is already in the jurisdiction of this Court: file a motion in the district court, asking it to indicate its willingness to entertain the motion, and only after a ruling has been made on such a request, come to this Court and

seek a remand. 971 F.2d at 332. While Petitioner speculates that the District Court would be willing to entertain a Rule 60 motion (and may well be right), the fact remains that he has not followed the procedure laid out for him in *Carriger*.

However, regardless of whether the District Court would be willing to hear a Rule 60 motion, it is clear that no such remedy would be proper, so there is no reason to grant the remand. The proper parameters of such a motion were addressed in *Greenawalt*, 105 F.3d at 1273, which points out that such relief is available only in "extraordinary circumstances," and presupposes the existence of an erroneous judgment which causes identifiable prejudice to the movant. Those requirements are not satisfied here. The District Court was constrained by the law to do what it did, both in originally finding the competency for execution claim premature and in denying the Rule 59 motion which attempted to keep the unexhausted competency claim in the federal court while the state proceedings concerning it were on-going. To whatever extent either of those ruling was based on an erroneous understanding of what sort of federal remedies were still open to Petitioner, the fact remains that they were correct, so Petitioner can demonstrate neither a wrong ruling nor cognizable prejudice; the claim made here is legally indistinguishable from the one rejected by this Court in *Greenawalt*, where the District Court also was confused about the effects on the litigation of the AEDPA. (*Id.* at 1273-76.) Therefore, Petitioner is not entitled to the relief he requests.

This conclusion is not altered by Petitioner's reiteration of his *ad hominem* attacks on counsel for Respondents, citation of Rule 60(b)(3), and invocation of *Russell v. Rolfs* and *Burris v. Parke*. As demonstrated above, his complaints are factually baseless as well as legally unfounded. It is worthy of note that the District Court, as upset as it evidently is about its position in this case, has never made a finding supportive of Petitioner's claims of misconduct against counsel for Respondents. Its order (at 2) acknowledges that Respondents argued that the issue was not ripe in the first habeas petition, not only because there was no execution warrant, but also "because the Petitioner's competency could change over time," thereby at least implicitly conceding that the nature of the claim prohibited meaningful adjudication until execution was imminent. The only thing recognized by the District Court's order as having affected the posture of the case is the passage of the AEDPA (not any misrepresentation or change of position by Respondents), which, of course, took place years after the litigation in question, and which Respondents could neither anticipate nor control. Petitioner's pejorative advocacy cannot obscure the utter absence of evidence of misconduct by Respondents, and the Court should not be swayed by the mere repetition of accusations.

Finally, it is worth repeating that Petitioner is wrong when he complains that he is "faced with no remedy at all." (Motion at 19.) He has a four-day evidentiary hearing in the Superior Court (twice what he got in front of the District Court in 1994). He has had review of that proceeding by the Arizona Supreme Court. Because of the requirement that the federal courts defer to the factual

findings of the state courts, that is effectively the only review he would have had even before passage of the habeas amendments. If he wishes to invoke them, he still has avenues of review by the United States Supreme Court. *In re Medina*, 109 F.3d at 1564. That is sufficient.

III

PERMISSION TO FILE A SUCCESSIVE PETITION NOT SUBJECT TO THE AEDPA SHOULD BE DENIED.

This argument (Motion at 19-21) again merely parades the same contentions under a different rubric. Petitioner persists in asserting that he will be deprived "completely" of the right to be protected from execution while incompetent, and that he is going to have his habeas rights "suspended completely." (*Id.* at 20, 21.) As described above, that simply is not true; it is only district court review which is removed, and that is a negligible loss in a case like this, where the District Court's role would have been limited to agreeing with the well-founded factual determination made by the state courts. And contrary to the assertion that the test of the AEDPA does not indicate an intent to divest federal courts of jurisdiction to enforce any federal constitutional rights, at least in the context of successive petitions, the Act does exactly that, by prohibiting consideration by the lower federal courts of any claims going to sentence, even in a capital case. *See Greenawalt*, 105 F.3d at 1277 (claim of ineffective assistance in capital sentencing precluded in successive petition by Act); *Greenawalt v. Stewart*, 105 F.3d 1287, 1288 (9th Cir. 1997) (constitutional claim against

lethal injection as mode of execution precluded in successive petition). The case Petitioner relies on, *Breard v. Angelone*, 926 F. Supp. 546 (E.D. Va. 1996), was decided before the Supreme Court decision in *Felker v. Turpin* and thus no longer is viable authority.

Petitioner claims he should be allowed to file a successive petition, unrestrained by the Act, because of the "unprecedented" circumstances of this case. An identically phrased request was rejected by this Court in *Greenawalt*, 105 F.3d at 1277. The arguments are no more persuasive here than they were in that case, so the Court should deny the request here as well.

IV

THE COURT SHOULD NOT RECALL ITS MANDATE IN THE PRIOR APPEAL IN ORDER TO HEAR THIS CLAIM.

Petitioner also urges this Court to recall its mandate in the prior appeal, in order to "retain jurisdiction over his present competency claim." (Motion at 4, 21-23.) There are several substantial reasons not to do so.

The very case on which Petitioner relies to show that the Court possesses the authority to recall its mandate emphasizes that that authority is a matter of discretion, and that it "should be exercised only in exceptional circumstance." *Zipfel v. Halliburton Co*, 861 F.2d 565, 567 (9th Cir. 1988). That same standard applies even in capital cases. *See Greenawalt*, 105 F.3d at 1276; *Nevius v. Sumner*, 105 F.3d 453, 460 (9th Cir. 1996); and *Williams v. Calderon*, 83 F.3d 281, 289 (9th Cir. 1996) – requests for recall denied in all three cases. "Mandates are rarely recalled, because only exceptional circumstances will override the strong

policy that there be an end to litigation." FEDERAL APPELLATE PRACTICE GUIDE – NINTH CIRCUIT § 9.18 at 9-44 (1944).[4] "In general, we will recall a mandate only when we are animated by 'an overpowering sense of fairness and a firm belief that this is the exceptional case requiring recall of the mandate in order to prevent an injustice." *Nevius v. Sumner, supra.*

This clearly is *not* such a case. The obvious purpose of the request is to somehow get this case back to "square one," prior to enactment of the AEDPA. But it must be recalled that at the time of the original District Court proceedings the competency claim was inescapably "premature," because no hearing had been sought or held under the proper state remedial provision, A.R.S. § 13-4022. *Martinez-Villareal v. Lewis*, 80 F.3d at 1307. Therefore, the District Court would not have been authorized to do anything except dismiss the claim; there was

[4] "The strong policy that there be an end to litigation" is particularly potent in this case. Not only has the Supreme Court repeatedly recognized that it is a grave affront to the dignity of a state which has exercised its sovereign authority to sentence and punish criminals to subject it to repetitious federal review through habeas corpus, but the Arizona Constitution bestows on victims and their families a right to speedy adjudication and closure of criminal cases, including post-conviction proceedings. "We are obligated by the Arizona Constitution to attempt to protect the rights of the victims of crime, which includes the right '[t]o a speedy trial or disposition and prompt and final conclusion of the case after the conviction and sentence.' Ariz. Const. art. 2, § 2.1(A)(10)." *State v. Mata*, 185 Ariz. 319, 337, 916 P.2d 1035, 1053 (1996). While not binding on this Court, this provision certainly creates another substantial interest weighing against recall of this Court's mandate from the previous appeal.

nothing for it to legitimately "review" at that point. If Petitioner elected to dismiss only the competency claim and proceed with the rest of his petition while he was exhausting that claim through state court proceedings, it was subject to being dismissed as successive when he brought it back to federal court, quite aside from the AEDPA, pursuant to *Rose v. Lundy*, 455 U.S. 509, 102 S. Ct. 1198, 71 L. Ed. 2d 379 (1982). On the other hand, suppose Petitioner chose to dismiss his entire petition until he could exhaust his competency claim, and then bring a completely exhausted petition into the District Court. The only "review" available would have been deferential to the factual determination of competency made by the state courts; absent a showing of cause and prejudice, Petitioner would not be entitled to an evidentiary hearing in the federal court. *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 112 S. Ct. 1715, 118 L. Ed. 2d 318 (1992). There being no reason to assume that the proceedings would be different in any other respect, it still would have taken Petitioner three years to get to the point of actually facing execution, at which time he would raise precisely the same claim (the former determination of "current" competency now arguably having become stale and inaccurate) – and again be presenting a successive petition.

The situation here is rather similar to the one presented in *Nevius v. Sumner*, where the petitioner sought to have the mandate recalled "to reopen the proceeding so that he may present new claims that now cannot be addressed in a subsequent petition," due to the decision in *McCleskey v. Zant*, 499 U.S. 467, 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991), and passage of the AEDPA. 105 F.3d at 461. This Court's statement in its first *Nevius* opinion,

that efforts should be made to present any additional evidence to the state courts, and thereafter the matter may be addressed in federal court, did not constitute a guarantee that he would not face procedural barriers (*id.*), anymore than Respondents' contention that Petitioner's claim was not ripe was a guarantee that he would later be exempt from whatever procedural barriers existed when the claim became ripe. There being no evidence that Nevius could have litigated his additional claim in a way that would have avoided the preclusive effect of *McCleskey*, it was evident that the unfairness he was complaining of was merely the legal landscape created by *McCleskey*, "an argument foreclosed by *McCleskey* itself." (*Id.* at 461-62.) Similarly, the "unfairness" Petitioner complains of is merely the result of the passage of the Act, not something anyone has invidiously done to him.

This Court refused to recall its mandate in *Nevius*. This Court also was emphatic in *Greenawalt* that the federal courts should not help habeas petitioners to evade the requirements of the AEDPA by bizarre procedural ploys. 105 F.3d at 1275. The same is true here, so the request for this Court to recall its mandate should be denied.

V

NO STAY OF EXECUTION SHOULD BE GRANTED.

Petitioner's final request, for a stay of execution, asks the Court to delay things long enough that the scheduled execution cannot take place. However, since all of the supportive arguments are transparently meritless, the request should be denied.

CONCLUSION

No adequate grounds for a stay or any other relief having been presented, all of Petitioner's motions should be denied forthwith.

DATED this 19th day of May, 1997.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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CAPITAL CASE: EXECUTION SCHEDULED FOR 12:05 A.M. MAY 21, 1997

Nos. 97-80229, 94-99011, 94-99012

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RAMON MARTINEZ-VILLAREAL,
Petitioner/Appellant,
vs.
TERRY STEWART, et al.,
Respondents/Appellees.

RAMON MARTINEZ-VILLAREAL,
Petitioner/Appellant,
vs.
SAMUEL LEWIS, et. al.,
Respondents/Appellees.

REPLY TO OPPOSITION TO MISCELLANEOUS RELIEF

The State's opposition to Mr. Martinez-Villareal's motions contests many things, but it leaves uncontested several crucial points.

1. The District Court's dismissal orders, and its order denying reconsideration of the dismissal dated March 24, 1997, were based on a mistaken understanding of the law – a belief that its jurisdiction to consider Mr.

Martinez-Villareal's present competence claim would not be affected by those orders. Respondent now suggests (but does not directly say) that it, too, did not understand that the dismissal orders would have this legal effect "until weeks later, after Petitioner's notice of appeal had been filed on April 17 . . . " Resp. Mem. Opp. 6. That suggestion may rebut the appearance that the Respondent deliberately waited to notify the District Court of its changed position until the District Court lost jurisdiction over the case; but it does not change the fact that the legal premise of the District Court's exercise of its discretion was legally erroneous. It therefore does not eliminate the principal reason on which Mr. Martinez-Villareal has based his request for leave to appeal. *See* Motion for CPC, etc., at 14-16.

2. Respondent also agrees that all state remedies on this issue have now been exhausted (Resp. Mem. Opp. At 4-5), and does not dispute the fact that no claim of nonexhaustion was ever made in the District Court, prior to the entry of the dismissal orders. Respondent's characterization of its position in 1993-1994 (Resp. Mem. Opp. At 13) suggests that it made a nonexhaustion argument then; but it clearly did not. The motion for summary judgment that Respondent filed in lieu of an answer under Habeas Rule 5 made no claim of nonexhaustion, as to any issue.[1]

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[1] *See* Except of Record, *Martinez-Villareal v. Lewis*, Nos. 94-90011/12 at 321-371. With regard to present competence, the Respondent's motion argued exclusively that the claim was not "ripe" because no execution warrant had been issued by the Arizona Supreme Court. *See id.* at 363, 365. Its conclusion was "if a warrant for his execution issues, and if he still claims to be incompetent at that time, there will be a jurisdictionally

Habeas Rule 5 requires that an answer to a habeas corpus petition "shall state whether the petitioner has exhausted his state remedies including any postconviction remedies available to him . . . " The failure to raise any claim of nonexhaustion, in an answer or elsewhere in District Court, waives the claim. Respondent thus says nothing to rebut Appellant's position that nonexhaustion has been waived here.[2]

3. Respondent's arguments on the factual merits of the competence claim (Resp. Mem. Opp. 7-9), only underscore the powerful factual disputes that underlie this issue.[3] Those disputes were acknowledged in the state

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sufficient case or controversy, and that will be the time to litigate the issue." ER 365. That argument, which cited Article II of the Federal Constitution, plainly conceded future federal, rather than state litigation.

[2] Moreover, with the Arizona Supreme Court's May 16, 1997 Order, there has now been exhaustion of all state remedies. Nonexhaustion therefore could not be the basis for a dismissal order on remand. *Sharpe v. Buchanan*, 317 U.S. 238 (1942); *Thomas v. Teets*, 205 F.2d 236, 240 (9th Cir. 1953) ("it is the condition of the habeas corpus proceeding as it is in the appellate court which is determinative); *Schwartzmiller v. Gardner*, 752 F.2d 1341, 1344 (9th Cir. 1984). It therefore could form no basis for this Court's affirmance of the District Court, even if it was properly raised now.

[3] For example, Respondents contend that if the District Court had heard the testimony presented at the recent state court hearing, he would have learned of "uncontroverted avowals" showing that Petitioner "had conspicuously changed his behavior, in a manner indicating malingering" in time for the district court hearing and then went back to "proper personal upkeep" after the hearing concluded. Respondents' characterization of this testimony is misleading. What Respondents do not mention is that the time frame for these

court's decision denying Mr. Martinez-Villareal relief, and by two of the concurring Justices of the Arizona Supreme Court who agreed that "the evidence makes it clear that defendant is mildly retarded and seriously mentally ill." *Martinez-Villareal v. Pinal County Superior Court, et al.*, Ariz.Sup.Ct. No. CV-97-0206-SA (filed May 16, 1997), at 3. Judge Bilby, who has heard extensive evidence on this same claim, plainly shares that view, and believes the present competence claim has probable merit. Whether review of the present state court record would change his view is the question to be decided on remand. Whether Mr. Martinez-Villareal's competence is

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events coincides exactly with the prison doctors' withdrawal of Mr. Martinez-Villareal's medication before the hearing, and then their resumption of his medication after the hearing concluded. Then treating DOC psychologist Ram Gopalon after testifying at 1994 evidentiary hearing in federal court, and observing other testimony, changed his diagnosis for Mr. Martinez-Villareal back to schizophrenia and resumed medicating Mr. Martinez-Villareal for this condition, including increasing the dosage of the psychotropic medication. This is the reason Mr. Martinez-Villareal was able to manage some basic personal hygiene.

Respondents also do not mention that the guards' testimony was that Mr. Martinez-Villareal lives in a highly structured environment and has very little opportunity to exhibit any kind of problem-solving skill or behavior. He is almost constantly withdrawn and his affect almost constantly flat with only a few exceptions. He do not talk to anyone and has no friends. The only English he understands is that related to his daily routine, in other words, concrete commands like "shower," "shave" and "food." The state's expert, Dr. Johnson, testified that the behavior reported by guards is consistent with the behavior exhibited by long term psychiatric residential patients.

viewed as a question of fact or one of law – a difficult and unresolved issue,[4] even if this is deemed a factual question, the adequacy of the state court hearing on it, and the adequacy of the state court record supporting it, are still subject to independent federal review. *See* 28 U.S.C. §2254(d). That review cannot be conducted without the state court record, which Respondent concedes has not yet come before the federal court. *See Hamilton v. Vasquez*, 882 F.2d 1469 (9th Cir. 1989).

Respondent cites *Greenawalt v. Stewart*, 105 F.3d 1268 (9th Cir. 1997), *In re Medina*, 109 F.3d 1556 (11th Cir. 1997), and *Nevius v. Sumner*, 105 F.3d 463 (9th Cir.), *petition for rehearing and suggestion for rehearing en banc pending*, but ignores the key distinction between this case and those: in this case, the initial federal habeas corpus proceedings have not ended. The arguments Petitioner is making here are not made solely in support of the filing of a successive petition, as in all those cases, but of an appeal from the dismissal of his first habeas corpus petition, which has never fully been resolved.

4. With regard to Petitioner's argument that he should be permitted to proceed in a successive posture, without the additional barriers of the AEDPA, Respondent has provided no good distinction between this case

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[4] The cases Respondent cites predate Thompson v. Keohane, 116 S.Ct. 4576 (1995), which cast new light on the fact/law distinction under §2254. Even before Thompson, competence claims presented were difficult to categorize in this regard. *See* 1 Liebman & Hertz 578-581 & n.55 (2d ed. 1994) (collecting cases regarding conflict in the circuits as to whether competence to stand trial is a factual or mixed factual/legal issue).

and *Burris v. Park*, 95 F.3d 465 (7th Cir. 1996). There is no distinction between this case and *Burris* based on *Medina*; what *Medina* provides is the same sort of procedural barrier to a successive litigation of a competence claim, that would have barred Burris's claim under the Seventh Circuit's decision that the AEDPA is retroactive. The crucial point for the majority in *Burris* was the inequity that failing to make an exception to that bar would create. Those inequities are different from and far greater than those in *Greenawalt*, *Nevius*, and *Medina*. They clearly favor allowing the meaningful litigation of Petitioner's present competency claim, in federal court, which Petitioner has applied for and been promised for years.

Dated this 19th day of May, 1997.

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/s/ Denise I. Young

Ramon MARTINEZ-VILLAREAL,
Petitioner/Appellant,

v.

Terry STEWART,
Respondent/Appellee.

Ramon MARTINEZ-VILLAREAL,
Petitioner-Appellee/Cross-Appellant,

v.

Terry STEWART,
Respondent-Cross-Appellant/Appellee.

Nos. 97-80229, 94-99011 and 94-99012.

United States Court of Appeals,
Ninth Circuit.

May 19, 1997.

After petitioner, who was convicted of murder, was unsuccessful in several state post-conviction relief petitions, the Court of Appeals denied relief on federal habeas corpus petition, 80 F.3d 1301, holding that petitioner's claim that he was incompetent to be executed was premature. After state court denied relief on claim that petitioner was not competent to be executed, petitioner moved for stay of execution, leave to file subsequent petition in district court, certificate of probable cause, remand to file motion for relief from judgment, and motion to recall mandate. The Court of Appeals held that: (1) claim that federal courts were foreclosed from hearing claim on competency to be executed warranted stay of execution, and (2) petitioner would not be granted remand and leave to file motion to set aside judgment in district court.

Execution stayed; supplemental briefing ordered; other motions denied.

Before: D. W. NELSON, LEAVY and T. G. NELSON, Circuit Judges

Ramon Martinez-Villareal moves this court for, inter alia, a stay of execution and leave to file a subsequent petition in district court. For the reason explained below, we stay the execution and order further briefing.

I

Background

Martinez-Villareal was convicted of murder in Arizona and his conviction and sentence of death were upheld by the Arizona Supreme Court. *State v. Martinez-Villareal*, 145 Ariz. 441, 702 P.2d 670, *cert. denied*, 474 U.S. 975, 106 S.Ct. 339, 88 L.Ed.2d 324 (1985). Martinez-Villareal was thereafter unsuccessful in several State post-conviction relief petitions, and we denied relief in *Martinez-Villareal v. Lewis*, 80 F.3d 1301 (9th Cir.), *cert. denied*, ___ U.S. ___, 117 S.Ct. 588, 136 L.Ed.2d 517 (1996). In that decision, we specifically held that Martinez-Villareal's claim that he was incompetent to be executed was premature. *Id.* at 1309, n. 1.

Martinez-Villareal returned to the courts of Arizona in February, 1997, by filing a "Motion Pursuant to ARS § 13-4022." Arizona's statutory scheme, as embodied in that section, authorizes the superior court to appoint experts and hold a hearing concerning a condemned prisoner's competence to be executed if a proper preliminary showing is made. The Arizona Superior Court held that

Martinez-Villareal had made a sufficient showing, and appointed the experts designated by Martinez-Villareal and the State. After denying Martinez-Villareal's motion to hold a portion of the statutory scheme unconstitutional because, *inter alia*, it placed the burden on Martinez-Villareal to demonstrate his incompetence, the court held a four-day evidentiary hearing which concluded on May 8, 1997. After the hearing, the court entered a written minute order in which it found, in part, as follows:

> 4. That the determination whether the burden of proof has been met may only be made after a careful review and analysis of all the evidence presented [to] the Court; that, upon review of all the evidence presented [to] the Court, this Court FINDS that the Defendant has failed to prove by clear and convincing evidence, or by the lesser standard of preponderance of the evidence, that he is not competent to be executed;
>
> 5. That the Court FURTHER FINDS that Defendant is aware that he is to be punished for the crime of murder and that he is aware that the impending punishment for that crime is death; that the Defendant, Ramon Martinez-Villareal, is therefore competent to be executed under the laws of the State of Arizona.

Martinez-Villareal petitioned the Arizona Supreme Court for special action pursuant to ARS § 13-4022(G). The Arizona Supreme Court accepted jurisdiction but, on May 16, 1997, denied relief.

Martinez-Villareal moved to amend the district court's judgment, which had dismissed his incompetency claim without prejudice, and asked the district court to hold the claim in abeyance. Following the district court's

denial, Martinez-Villareal filed a notice of appeal. Both the district court and this court denied a certificate of appealability.

On May 16, 1997, counsel for Ramon Martinez-Villareal filed the following motions in this court: motion for stay of execution; motion for leave to file subsequent petition; motion for certificate of probable cause; motion for remand to file Fed.R.Civ.P. 60(b) motion; and motion to recall the mandate.

II

Stay of Execution and Leave to File Subsequent Petition

Martinez-Villareal has raised a competency to be executed claim under *Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986). In doing so, he has presented a unique and fundamental constitutional challenge to a provision of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2244 (1996). Martinez-Villareal asserts that a competency to be executed claim can never be heard by a federal court, and that this preclusion constitutes an unconstitutional suspension of the writ of habeas corpus. We find that his argument merits further consideration.

Ford v. Wainwright holds that the Eighth Amendment "prohibits a state from carrying out a sentence of death upon a prisoner who is insane." 477 U.S. at 409-10, 106 S.Ct. at 2602. However, the determination of whether an inmate is competent to be executed cannot be made before the execution is imminent, i.e., before the warrant of execution is issued by the State. *See Herrera v. Collins,*

506 U.S. 390, 406, 113 S.Ct. 853, 863-64, 122 L.Ed.2d 203 (1993) ("[T]he issue of sanity is properly considered in proximity to the execution."). The federal district court and this court recognized this problem when both courts dismissed Martinez-Villareal's competency claim as premature. *See Martinez-Villareal v. Lewis*, 80 F.3d 1301, 1309 n. 1 (9th Cir.1996).

This principle must be read together with the Supreme Court's instruction in *Lonchar v. Thomas*, ___ U.S. ___, ___, 116 S.Ct. 1293, 1297, 134 L.Ed.2d 440 (1996), that "if the district court cannot dismiss the [first habeas] petition on the merits before the scheduled execution, it is obligated to address the merits and must issue a stay to prevent the case from becoming moot." Once this stay has been issued, the execution is not imminent, and the competency to be executed claim becomes premature. Accordingly, it appears that this claim cannot be asserted in a first habeas petition.[1]

Under the AEDPA, the claim cannot be asserted in a second petition either. Section 2244 provides that

> (b)(2) [a] claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless –
>
> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244(b)(2) (1996).

The gateway described in subsection (A) does not apply to a competency claim because the constitutional right upon which such a claim is based was announced in 1986. The gateway described in subsection (B) does not apply because competency to be executed is not an issue of guilt or innocence. It thus appears that the automatic stay accompanying a first habeas petition and the inapplicable gateway provided by the AEDPA foreclose any federal review of a death row inmate's competency to be executed. *See In re Medina*, 109 F.3d 1556, 1564-65 (11th Cir.1997).

The Constitution's Suspension Clause provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be

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[1] This result is exacerbated by 28 U.S.C. § 2263, which provides that any application for habeas corpus relief under section 2254 "must be filed in the appropriate district court not later than 180 days after final State court affirmance of the conviction and sentence on direct review." 28 U.S.C. § 2263(a). This statute of limitations is tolled "from the date on which the first petition for post-conviction review or other collateral relief is filed until the final State court disposition of such petition." 28 U.S.C. § 2263(b)(2). It is unlikely that a warrant of execution will issue before this clock expires.

suspended." U.S. Const., Art. I, § 9, cl. 2. Martinez-Villareal has demonstrated that a district court will never be able to hear his competency to be executed claim. Whether this amounts to an unconstitutional suspension of the writ depends upon whether the Supreme Court may entertain such a claim in the exercise of its jurisdiction over original habeas petitions.

This question remains unanswered after *Felker v. Turpin*, ___ U.S. ___, 116 S.Ct. 2333, 135 L.Ed.2d 827 (1996). In *Felker*, the Court concluded that the "gatekeeping" system of the new Act (codified at 28 U.S.C. § 2244(b)(3)), whereby a petitioner must obtain the permission of the court of appeals before filing a second or successive petition in the district court, "does not apply to our consideration of habeas petitions because it applies to applications 'filed in the district court.' " *Felker*, ___ U.S. at ___, 116 S.Ct. at 2339. The Court did not decide the question of whether it was bound by the restrictions imposed by section 2244(b)(2) and (3). *See id.* The question is an open one. *See Felker*, ___ U.S. at ___, 116 S.Ct. at 2339.[2] The Supreme Court noted that "[w]hether or not we are bound by [section 2244(b)'s] restrictions, they certainly inform our consideration of original habeas petitions." *Id.* At least on its face, section 2244(b) appears to apply to second or successive habeas corpus petitions even when presented originally to the Supreme Court. *See*

[2] We recognize that the Eleventh Circuit has confronted this precise issue. Although that court concluded that the AEDPA does not permit consideration of a competency claim, it did not expressly consider whether this violated the Suspension Clause. *See In re Medina*, 109 F.3d 1556, 1564-65 (11th Cir.1997).

28 U.S.C. § 2244(b). If these restrictions apply even to the Supreme Court's original habeas jurisdiction, then relief on competency to be executed claims could never be granted by any federal court. This might result in an unconstitutional suspension of the writ of habeas corpus.[3]

Because of the importance of Martinez-Villareal's claim that the AEDPA unconstitutionally suspends the writ of habeas corpus for petitioners who present a competency to be executed claim, we issue a stay of execution and order the parties to submit supplemental briefing on this discrete question. Under the AEDPA, this court must decide within thirty days whether to grant or deny a motion to file a subsequent petition. *See* 28 U.S.C. § 2244(b)(2)(D). Accordingly, the stay shall not exceed thirty days from May 16, 1997, the date Martinez-Villareal filed his motion to file a subsequent petition. Martinez-Villareal shall file a supplemental brief addressing the constitutional issue within seven days of the date of this order. The State of Arizona shall respond within seven days of the date that Martinez-Villareal's brief is filed.

[3] *Greenawalt v. Stewart*, 105 F.3d 1268, 1277 (9th Cir.1997) (section 2244 forecloses all successive-petition review of constitutional claims unrelated to guilt or innocence) did not decide this issue. Unlike Greenawalt's sentencing claim, Martinez-Villareal's competency to be executed claim cannot be decided in a first habeas petition.

III

Certificate of Probable Cause

Because in case No. 97-99009 we ruled on Martinez-Villareal's motion for a certificate of probable cause, we deny his identical motion in No. 97-80229.

IV

Remand to File Rule 60(b) Motion

Martinez-Villareal moves for remand and leave to file a Fed.R.Civ.P. 60(b) motion in district court. We deny the motion because: (1) there is no pending appeal to remand; and (2) Martinez-Villareal has pointed to no law requiring the court of appeals to authorize the filing of a Rule 60(b) motion in district court.

V

Recall the Mandate

Martinez-Villareal moves this court to recall the mandate issued in Nos. 94-99011, 94-99012. Because this court's decision to deny the competency to execute claim as premature was correct, we again decline to do so. Any available relief must be sought under current law.

MOTIONS FOR CERTIFICATE OF PROBABLE CAUSE AND FOR REMAND TO FILE RULE 60(b) MOTION AND TO RECALL THE MANDATE DENIED; EXECUTION STAYED; SUPPLEMENTAL BRIEFING ORDERED.

Ramon MARTINEZ-VILLAREAL,
Petitioner,

v.

Terry STEWART,
Respondent.

Ramon MARTINEZ-VILLAREAL,
Petitioner,

v.

Terry STEWART,
Respondent.

Nos. 97-80229, 97-80249.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted June 9, 1997.

Submitted June 9, 1997.*

Decided June 23, 1997.

Inmate under sentence of death moved to reopen his first habeas proceeding for consideration of his claim that he was not competent to be executed, which claim was originally dismissed without prejudice as premature. The United States District Court for the District of Arizona held that, as result of Antiterrorism and Effective Death Penalty Act (AEDPA), it lacked jurisdiction to consider that claim. Inmate then moved for permission to file successive petition. After staying execution, 118 F.3d 625, the Court of Appeals held that AEDPA's prohibition on

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* The panel unanimously finds this case suitable for submission without oral argument pursuant to Fed. R.App. P. 34(a) and Ninth Cir. R. 34-4.

second or successive petitions does not apply to petition that raises only competency to be executed claim which was originally dismissed without prejudice as premature.

Motion dismissed, petition transferred.

T.G. Nelson, Circuit Judge, issued specially concurring opinion.

Fredric F. Kay, Federal Public Defender, Denise I. Young, Assistant Federal Public Defender, Dale A. Baich, Office of the Federal Public Defender, Phoenix, AZ, Sean D. O'Brien, Public Interest Litigation Clinic, Kansas City, MO, for petitioner.

Bruce M. Ferg, Assistant Attorney General, Tucson, AZ, for respondent.

Application for Order to File Successive Petition for Writ of Habeas Corpus in the District Court for the District of Arizona.

Before: D. W. NELSON, LEAVY, and T. G. NELSON, Circuit Judges.

Order; Concurrence by Judge T. G. Nelson.

PER CURIAM.

Petitioner has moved for permission to file a successive habeas corpus petition in the district court pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), codified in relevant part at 28 U.S.C. § 2244. We hold that § 2244's prohibition on second or successive petitions does not apply to a petition that raises only a competency to be executed claim under *Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986).

I.

Ramon Martinez-Villareal was convicted on two counts of first-degree murder and was sentenced to death. *See State v. Martinez-Villareal*, 145 Ariz. 441, 702 P.2d 670 (1985). Martinez-Villareal filed a petition for habeas corpus in the federal district court on March 25, 1993. He asserted, inter alia, that he was not competent to be executed. The district court dismissed this claim without prejudice as premature[1] and granted the writ on other grounds. We reversed the district court's decision but explained that "[o]ur instruction to enter judgment denying the petition is not intended to affect any later litigation of [the competency to be executed] question." *Martinez-Villareal v. Lewis*, 80 F.3d 1301, 1309 n. 1 (9th Cir.1996).

On remand to the district court, Martinez-Villareal moved the court to reopen the first habeas proceeding. Martinez-Villareal feared that the newly enacted AEDPA would foreclose review of his competency claim on a

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[1] It was the State of Arizona that had suggested to the district court that Martinez-Villareal's competency claim was not ripe for adjudication. The State pressed the importance of having

> a single adjudication of competency, *at a time when all [of Martinez-Villareal's] other claims have been resolved and a warrant has been issued*, so that an execution actually is imminent within a reasonable period of time. . . . To do a competency determination now would be futile, because it will certainly have to be repeated when the time for execution finally arrives.

State of Arizona's Reply to Response to Motion for Summary Judgment, Dec. 17, 1993, at 45-46 (emphasis added).

second petition despite the parties' and the court's intention to address the claim once a warrant of execution had issued. On March 24, 1997, the district court denied the motion and reassured Martinez-Villareal that it had "no intention of treating the 'incompetency to be executed' claim as a successive petition."

On May 16, 1997, despite this assurance, the district court recognized that "as a result of the AEDPA, it does not have jurisdiction to entertain" Martinez-Villareal's competency claim. The district court noted that "the AEDPA effectively deprives all federal district courts of jurisdiction to entertain second petitions raising Eighth Amendment 'competency to be executed' claims." On May 19, 1997, we stayed Martinez-Villareal's execution to consider whether this is indeed the case and, if so, whether it constitutes a suspension of the writ of habeas corpus.

II.

Ford v. Wainwright holds that the Eighth Amendment "prohibits a state from carrying out a sentence of death upon a prisoner who is insane." 477 U.S. at 409-10, 106 S.Ct. at 2602. However, the determination of whether an inmate is competent to be executed cannot be made before the execution is imminent, i.e., before the warrant of execution is issued by the state. *See Herrera v. Collins*, 506 U.S. 390, 406, 113 S.Ct. 853, 863, 122 L.Ed.2d 203 (1993) ("[T]he issue of sanity is properly considered in proximity to the execution.").

When Martinez-Villareal first raised his competency claim in federal court, the State of Arizona had not yet

issued a warrant of execution. Thus, although we disposed of every other claim raised by Martinez-Villareal in his first habeas petition, we declined to address his competency claim because it was premature. *See Martinez-Villareal*, 80 F.3d at 1309 n. 1.

Even if the State had issued its warrant of execution prior to our consideration of Martinez-Villareal's first habeas petition, his competency claim still would have been premature. In *Lonchar v. Thomas*, ___ U.S. ___, ___, 116 S.Ct. 1293, 1297, 134 L.Ed.2d 440 (1996), the Supreme Court instructed that "if the district court cannot dismiss the [first habeas] petition on the merits before the scheduled execution, it is obligated to address the merits and must issue a stay to prevent the case from becoming moot." Once this stay has been issued, the execution is not imminent, and the competency claim becomes premature. Accordingly, a competency claim cannot be asserted in a first habeas petition.

Under the AEDPA, such a claim cannot be asserted in a second petition either. Section 2244 of the AEDPA divides the world of second or successive petitions into two categories: Those that raise claims that were presented in a previous petition, and those that raise claims that were not presented in a previous petition. A claim that was presented in a prior petition must be dismissed. 28 U.S.C. § 2244(b)(1). This sanction applies to a competency claim raised in a first petition even though that claim can never be adjudicated because it will always be premature. Accordingly, a petitioner must reserve his colorable competency claim and present it as a new claim in a second petition. But a claim that was not presented in a prior petition must be dismissed unless

> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
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> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244(b)(2).

The gateway described in subsection (A) does not apply to a competency claim because the constitutional right upon which such a claim is based was announced in 1986. The gateway described in subsection (B) does not apply because competency to be executed is not an issue of guilt or innocence. *See Greenawalt v. Stewart*, 105 F.3d 1268, 1277 (9th Cir.) ("[T]he new 28 U.S.C. § 2244(b)(2)(B) forecloses all successive-petition review of constitutional claims unrelated to guilt or innocence."), *cert. denied*, ___ U.S. ___, 117 S.Ct. 794, 136 L.Ed.2d 735 (1997). It thus appears that the automatic stay accompanying a first habeas petition and the inapplicable gateways provided by the AEDPA foreclose any federal review of a death row inmate's competency to be executed.

III.

We are asked to decide whether this predicament constitutes an unconstitutional suspension of the writ of habeas corpus. The Suspension Clause provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const., Art. I, § 9, cl. 2.[2] Martinez-Villareal has demonstrated that a district court will never be able to hear his (or anybody's) competency to be executed claim. Whether this amounts to an unconstitutional suspension of the writ depends upon whether *any* federal court is authorized to entertain Martinez-Villareal's competency claim.

We already have noted how the new statute precludes a federal district court from hearing a colorable competency claim on either a first or second petition. Thus, whether the writ has been suspended depends upon whether or not the Supreme Court may entertain a colorable competency claim in the exercise of its jurisdiction to hear original habeas applications.[3]

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[2] The State correctly observes that the writ known to the Framers "was quite different from that which exists today." *Felker v. Turpin*, ___ U.S. ___, ___, 116 S.Ct. 2333, 2339, 135 L.Ed.2d 827 (1996). But like the Supreme Court, we assume that "the Suspension Clause of the Constitution refers to the writ as it exists today, rather than as it existed in 1789." *Id.* at ___, 116 S.Ct. at 2340.

[3] We reject the suggestion that direct review by the Supreme Court of the state court's competency proceedings suffices to sustain § 2244 against constitutional attack. Certiorari review does not amount to an adequate alternative form of collateral relief, *see Swain v. Pressley*, 430 U.S. 372, 381, 97

This question was not specifically answered in *Felker*. In *Felker*, the Court concluded that the "gatekeeping" system of the new Act, codified at 28 U.S.C. § 2244(b)(3), whereby a petitioner must obtain the permission of the court of appeals before filing a second or successive petition in the district court, "does not apply to our consideration of habeas petitions because it applies to applications 'filed in the district court.' " *Felker v. Turpin*, ___ U.S. ___, ___, 116 S.Ct. 2333, 2339, 135 L.Ed.2d 827 (1996). But the Court did not decide the question of whether it was bound by the restrictions imposed by §§ 2244(b)(1) and (2) – the subsections that specifically foreclose consideration of Martinez-Villareal's competency claim.

The Court did, however, provide us with signposts suggesting its future response to this question. First, the Court noted that "[w]hether or not we are bound by these restrictions [of §§ 2244(b)(1) and (2)], they certainly inform our consideration of original habeas petitions." *Id.*

Second, the Court's reason for concluding that it is *not* bound by § 2244(b)(3) strongly suggests that it *is* bound by §§ 2244(b)(1) and (2). Section 2244(b)(3) discusses petitions that are filed "in the district court." The Supreme Court inferred that Congress therefore did not intend for that subsection to apply to petitions filed in the

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S.Ct. 1224, 1229-30, 51 L.Ed.2d 411 (1977), because it is not collateral review at all. We recognize that this conclusion directly contradicts the Eleventh Circuit's decision in *In re Medina*, 109 F.3d 1556, 1564 (11th Cir.1997) ("review [of a competency claim] could be sought through certiorari review of the state court competency proceedings").

Supreme Court. Unlike § 2244(b)(3), §§ 2244(b)(1) and (2) do not contain limiting language and refer generally to all second or successive petitions. If § 2244(b)(3) does not apply to the Supreme Court because it is expressly limited to petitions filed in the district court, then §§ 2244(b)(1) and (2) should apply to the Supreme Court because they are not similarly limited.

Taken together, these signposts suggest that even the Supreme Court is bound by the new limitations on habeas review imposed by § 2244(b)(1) and (2).[4] If we are correct, then a state prisoner's competency claim can never be heard by any federal court.

The constitutional problem with this preclusion is patent. Indeed, the Supreme Court upheld the AEDPA's gatekeeping provisions against attack under the Suspension Clause because such provisions were a "modified res judicata rule, a restraint on what is called in habeas corpus practice 'abuse of the writ.' " *Felker*, ___ U.S. at ___, 116 S.Ct. at 2340. But the restrictions on successive petitions containing a colorable competency claim cannot be justified as a modified res judicata rule because res judicata cannot apply to a claim that will always be premature on a first petition.

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[4] We recognize that the Eleventh Circuit has reached the opposite result. We believe, however, that *In re Medina* is based upon a misreading of *Felker*. *Medina*'s conclusion that "the provisions of § 2244(b), as amended, do not restrict [the Supreme] Court's original habeas authority," 109 F.3d at 1564, ignores both the Court's statement that it is at least "informed" by §§ 2244(b)(1) and (2), as well as the literal distinction between § 2244(b)(3) and §§ 2244(b)(1) and (2).

We are left, then, with strong indications that under these narrow circumstances, the new statute poses a serious constitutional problem.[5]

IV.

We need not decide this difficult constitutional question because we conclude that Martinez-Villareal's competency claim does not fall within the rubric of § 2244. *See DeBartolo Corp. v. Florida Gulf Coast Trades Council*, 485 U.S. 568, 575, 108 S.Ct. 1392, 1397-98, 99 L.Ed.2d 645 (1988) ("Where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."); *Tashima v. Administrative Office of the U.S. Courts*, 967 F.2d 1264, 1268 (9th Cir.1992).

In *In re Turner*, we concluded that "section 2244 does not apply to second or subsequent habeas petitions where the first petition was dismissed without prejudice for failure to exhaust state remedies." 101 F.3d 1323, 1323 (9th Cir.1996). The Second Circuit arrived at the same

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[5] *Greenawalt* did not resolve the constitutional question with which we are faced. The *Greenawalt* court rejected the petitioner's claim that § 2244 "forecloses all successive-petition review of constitutional claims unrelated to guilt or innocence." 105 F.3d at 1277; *see also Medina*, 109 F.3d at 1565 (stating that the "plain terms" of § 2244(b)(2)(B) make it clear that "it has no application to claims that relate only to the sentence"). However, Greenawalt's sentencing claim was the type of claim that could be raised and addressed in a first petition. As we have explained, Martinez-Villareal's competency claim will never be addressed on its merits in a first petition.

conclusion in *Camarano v. Irvin*, 98 F.3d 44 (2d Cir.1996). The *Camarano* court confronted the question of "whether a habeas petition qualifies as a 'second or successive' application within the meaning of § 2244, where it is filed after a prior petition is dismissed without prejudice for failure to exhaust state remedies." *Camarano*, 98 F.3d at 46. The court concluded that "because application of the gatekeeping provisions [of § 2244] to deny a resubmitted petition in cases such as this would effectively preclude any federal habeas review. . . . a dismissal without prejudice can have no preclusive effect on subsequent petitions." *Id.* at 46-47; *see also Christy v. Horn*, 115 F.3d 201 (3d Cir.1997).

Turner and *Camarano* are founded upon exhaustion principles. Where a state prisoner has failed to exhaust state remedies, the federal habeas court may not grant his petition. 28 U.S.C. § 2254(b)(1). This rule obtains even where a habeas application contains both exhausted and unexhausted claims. *See Rose v. Lundy*, 455 U.S. 509, 522, 102 S.Ct. 1198, 1205, 71 L.Ed.2d 379 (1982) ("A district court must dismiss habeas petitions containing both unexhausted and exhausted claims."). Where *Rose* applies, a petitioner must return to state court and litigate the unexhausted claims before presenting those claims in a new habeas petition to the federal court.

Rose aims to "protect the state court's role in the enforcement of federal law and prevent disruption of state judicial proceedings." *Rose*, 455 U.S. at 518, 102 S.Ct. at 1203. But *Rose* also ensures that a petitioner's federal claims, once exhausted, will be subject to federal review

by demanding that a petition containing both exhausted and unexhausted claims be dismissed in its entirety.[6]

Turner and *Camarano* sustained the viability of this scheme by ensuring that once all claims had been properly exhausted in the state courts, the state prisoner would still be able to raise his federal claims in a federal forum. To accomplish this result, both courts held that the new statute's reference to "second or successive petition" does not encompass petitions that are filed after original applications were dismissed in their entirety for failure to exhaust state remedies.

We are faced with a different situation. *Rose* did not require the dismissal of Martinez-Villareal's first petition in its entirety because we determined that his competency claim was premature, rather than unexhausted. Unlike the cases of *Turner* and *Camarano*, we now address a situation in which there has been a federal decision on all but one of Martinez-Villareal's constitutional claims.

We conclude, however, that the rationale underlying *Turner* applies with equal force to Martinez-Villareal's competency claim. Just as we must dismiss petitions containing unexhausted claims, we must dismiss a competency claim raised in a first petition because it will always

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[6] The *Rose* Court could have permitted a federal court to dismiss only a petitioner's unexhausted claims and entertain the exhausted ones on the merits. But the abuse of the writ doctrine probably would have precluded federal review of the remaining claims once those claims had been exhausted in state court and raised in a second petition. The *Rose* Court avoided this result by requiring dismissal of a mixed petition in its entirety.

be premature. Just as we dismiss unexhausted claims to permit state courts to pass first judgment on those claims, we dismiss a competency claim so that the state court may have the first opportunity to consider that claim once a warrant of execution has issued. And just as we permit an exhausted petition to be heard in federal court even after it had been dismissed previously as unexhausted, so too should we permit a ripe competency claim to be heard in federal court even after it had been dismissed previously as premature. *Turner* reached this result to ensure that a petitioner's federal claims are accorded one hearing in federal court. We now extend *Turner* to competency claims that previously were dismissed without prejudice as premature in order to ensure that such claims are likewise subject to federal review.

We believe that this result is justified by the fact that the normal procedural path contemplated by *Rose* and protected by *Turner* does not permit a federal court to consider a petitioner's competency claim. Let us suppose that we had dismissed Martinez-Villareal's first petition in its entirety pursuant to *Rose*. Let us also suppose that the State then issued a warrant of execution, thereby enabling Martinez-Villareal to exhaust his competency claim in state court. Finally, let us suppose that upon exhaustion of this claim, Martinez-Villareal brought a consolidated habeas petition to the federal courts containing all of his constitutional complaints, including his competency claim.

Under the rationale of *Rose* and the holding of *Turner*, we would construe this application as if it were Martinez-Villareal's first habeas petition. We would therefore be required to issue a stay of execution so that the federal

court could entertain (for the first time) his constitutional claims. The federal stay of execution, of course, would render his once-ripe competency claim premature, even though it has been exhausted in the state court. Thus, while this petition may be heard under *Rose* and *Turner*, the competency claim cannot be addressed until a second warrant of execution issues, the state court once again determines that the petitioner is competent, and the claim reappears before a federal court. Of course, at this point the federal court is precluded from reviewing the competency claim if it is deemed a "second or successive" petition barred by § 2244(b).

As the foregoing analysis indicates, application of *Rose* to a petition that includes a competency claim does not afford any opportunity for federal review. Moreover, to dismiss an entire first petition on the basis of an unexhausted competency claim ultimately will violate one of the animating purposes behind *Rose* and modern habeas jurisprudence. Under *Rose*, the state court must have the first opportunity to consider Martinez-Villareal's competency claim. But the state court's judgment will always be discarded as moot once the exhausted petition reaches the federal court and the mandatory stay issues. As a result, the state will always be required to begin again with the competency claim once the exhausted petition is adjudicated by the federal court, the premature competency claim is sent back to the state, and a new warrant of execution has issued. To say the least, this neither "protect[s] the state court's role in the enforcement of federal law," nor "prevent[s] disruption of state judicial proceedings." *Rose*, 455 U.S. at 518, 102 S.Ct. at 1203.

We believe that our extension of *Turner* to a competency claim that was originally dismissed without prejudice as premature avoids both a probable constitutional problem and unwarranted disrespect of state judicial proceedings. Under our holding, a competency claim must be raised in a first habeas petition, whereupon it also must be dismissed as premature due to the automatic stay that issues when a first petition is filed. Once the state issues a second warrant of execution and the state court considers the now-ripe competency claim, a federal court may hear that claim – and only that claim – because it was originally dismissed as premature and therefore falls outside of the rubric of "second or successive" petitions.[7]

Our holding is a narrow one that is inherently limited by the unique nature of a competency claim. Indeed, we can think of no other situation where a first petition

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[7] Indeed, we question whether the successive petition and abuse of the writ doctrines even apply to competency claims. As the Seventh Circuit recently noted, "[s]ection 2244(b) uses, but does not define, the phrase 'second or successive habeas corpus application.' " *Benton v. Washington*, 106 F.3d 162, 163 (7th Cir.1996). Due to its exceptional procedural posture, a petition raising only a competency claim might not be covered by this phrase. *See Fearance v. Scott*, 56 F.3d 633, 640 (5th Cir.1995) ("Because *Ford* claims . . . concern the petitioner's immediate mental state, neither this court nor the Supreme Court has definitively decided whether relief would appropriately be denied on either abuse of the writ or successive petition grounds."); *Barnard v. Collins*, 13 F.3d 871, 878 (5th Cir.1994) ("[O]ur research indicates no reported decision in which a federal circuit court or the Supreme Court has denied relief of a petitioner's competency-to-be-executed claim on grounds of abuse of the writ.").

meets *Rose* 's exhaustion requirement but a claim raised by that petition must be tabled as premature. We extend *Turner* to this circumstance, and this circumstance only.

V.

Martinez-Villareal's competency claim is not subject to the restrictions imposed by § 2244(b). Therefore, we dismiss as unnecessary Martinez-Villareal's motion for authorization to file a petition for writ of habeas corpus in the district court. We transfer the petition presented to Judge D.W. Nelson on May 30, 1997 (Docket No. 97-80249), to the district court pursuant to 28 U.S.C. § 2241(b).[8]

T.G. NELSON, Circuit Judge, specially concurring:

In my view, the 1996 Act unconstitutionally suspends the writ of habeas corpus as to competency to be executed claims. It does so in an unambiguous fashion, by prohibiting the consideration of claims in second or successive petitions that do not fit the exceptions found in § 2244(b)(1) and (2). As we point out in the order, Martinez-Villareal's competency to be executed claim cannot come within the statutory exceptions.

In *Turner*, we "looked through" a prior petition that had been dismissed without action. Since the earlier petition had no practical or legal effect, it was appropriate to

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[8] Henceforth, a state prisoner in Martinez-Villareal's situation – that is, one who seeks to file a petition that contains *only* a competency to be executed claim where such claim previously had been dismissed as premature – may file such a petition directly with the district court.

simply ignore it. By contrast, the petition which was the subject of our prior opinion was perhaps Martinez-Villareal's third try at getting into federal court, and was extensively litigated by the parties, to the point of denial of *certiorari* by the Supreme Court. 80 F.3d 1301 (9th Cir.), *cert. denied*, ___ U.S. ___, 117 S.Ct. 588, 136 L.Ed.2d 517 (1996). Thus, I don't believe *Turner* justifies our ignoring several years of litigation in the federal courts.

The law as it existed prior to the Act gave state prisoners the *opportunity* to present all their federal claims in federal court. They could lose the opportunity if they neglected to include a claim in a first petition. However, "old" § 2244(b) allowed the consideration of successive petitions containing "new grounds," if the "ends of justice" would be served. This opportunity was eliminated by the 1996 amendments to § 2244.

As we noted in our prior opinion, a petitioner could come to federal court with a "procedurally defaulted claim if the petitioner can show cause for the procedural default and actual prejudice as a result of the alleged violations of federal law." 80 F.3d at 1305. A showing of cause required the petitioner to demonstrate the existence of an objective factor external to the defense which hampered efforts to comply with the procedural rule. *Id.* (citing *Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639, 2645, 91 L.Ed.2d 397 (1986)). The lack of ripeness of a claim of incompetence to be executed would appear to be a classic case of an external impediment to presentation of the claim.

Thus, on April 23, 1996, a claim involving lack of competency to be executed could be considered in a

successive petition filed in federal court. On April 24, 1996, and since, under the clear terms of § 2244, such claims simply cannot be considered by any federal court, in spite of the fact that there was no earlier opportunity to do so. If the writ has not been suspended as to those claims, it is difficult to see how it can ever be suspended as to any class of claims.

My conclusion that the writ has been suspended as to claims such as Martinez-Villareal's would require an analysis of the appropriate remedy to ensure that Martinez-Villareal could get to federal court. The remedy we order, the transfer to the district court of the petition filed here, is an appropriate one, and I fully concur in the result.